UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 08-13555-scc

- x

In the Matter of:

LEHMAN BROTHERS HOLDINGS INC.,

Debtor.

- x

United States Bankruptcy Court

One Bowling Green

New York, NY 10004

February 8, 2018

12:32 PM

B E F O R E :

HON SHELLEY C. CHAPMAN

U.S. BANKRUPTCY JUDGE

ECRO: KAREN

HEARING re RMBS Claims Estimation Trial

Transcribed by: Sonya Ledanski Hyde

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P R O C E E D I N G S

THE COURT: Have a seat, please. How is everyone?

MAN 1: Well, thank you.

MR. COSENZA: Good. Thank you, Your Honor.

THE COURT: All right, Mr. Cosenza, I'm ready where you are.

MR. COSENZA: This is (indiscernible) Your Honor, and then Ms. Herman's going to hand out the slide decks for part of our closing. Thank you.

THE COURT: There are a number of parties on the phone in listen-only mode. Okay.

MR. COSENZA: Thank you, Your Honor. May it please the Court, Todd Cosenza from Willkie Farr & Gallagher, on behalf of the plan administrator. As an initial matter, I want to thank you, Your Honor, you and your clerks for your patience, efforts, and guidance during this proceeding. I also want to thank Your Honor for all the resources you devoted to this matter so the parties can have the results of this proceeding reflected in the plan administrator's March 2018 distribution.

We appreciate the Herculean effort and sacrifice on the Court's part to accommodate the party's request as reflected in the settlement, to try to bring these claims to a prompt resolution. We are deeply appreciative. We will try, in light of that, not to take too much of Your Honor's

time up today. And I've tried to winnow down as I reflect in my letter --

THE COURT: Okay.

MR. COSENZA: -- my presentation to hopefully be less than two hours.

THE COURT: Okay.

MR. COSENZA: Our intention, Your Honor, is to draw an emphasis on certain points raised in our briefing and to respond to some of the points raised by the Trustee's post-trial brief, and, of course, to respond to Your Honor's questions. Your Honor --

THE COURT: I intend to -- I know I say this frequently and I don't do it, but I intend to be very quiet so that you can maximize the amount of time that you have.

MR. COSENZA: Sure.

THE COURT: But I may ask a question or two.

MR. COSENZA: No worries at all. We've been at this for many years so we know.

THE COURT: Okay.

MR. COSENZA: I always overpromise in terms of how quick I'm going to be and--

THE COURT: And I overpromise about how quiet I'm going to be.

MR. COSENZA: Yes. So, Your Honor, you're going to hear from both myself and Mr. Rollin today.

THE COURT: Okay, very good.

MR. COSENZA: I will discuss the framework and background that led to this proceeding and the parties' respective approaches to this case. Mr. Rollin will discuss the parties' loan review processes, including how the parties dealt with the termination breach in AMA. And I will then discuss why we believe, from the plan administrator's perspective, that $2.3 billion is a fair and appropriate amount to estimate these claims.

I may ask to call on my colleague, Mr. Davis, to answer certain questions if Your Honor has some deep questions about some of the case law, particularly on the interest issues and on the approximate cost.

THE COURT: All right. And just to be clear, since I try to enforce a one-speaker-only rule during the trial, which I didn't successfully do at all times -- during the closings tomorrow for the Trustees, if there -- if I ask a question and someone else is in a better position to answer it than Mr. Shuster, we can follow a similar procedure.

MR. SHUSTER: Fair enough, Your Honor. Thank you.

THE COURT: All right? Okay.

MR. COSENZA: So, Your Honor, as I outlined in my opening statement, this matter has a long history but the history is critical to understanding the context of the

current proceeding. And so for the record, I'm going to provide a very brief overview of what led to the settlement that frames this proceeding. As the Trustees have acknowledged, the protocol provided them with a full and fair opportunity to prove their claims on a loan-by-loan basis with sufficient evidence, and the plan administrator agrees with that.

As I will detail shortly, there were a number of issues that led to a divergent of results during the protocol. Because of this divergence abuse, while the protocol was ongoing, the plan administrator reached out to the trust's largest beneficiaries, the institutional investors, through their counsel, as it was clear that they had played a critical role in resolving other comparable RNBS disputes.

As Your Honor heard from Professor Fischel, the institutional investors are some of the largest and most sophisticated financial institutions in the world. Sure. Your Honor is very familiar with this, trying to -- I'll be cognizant of the court reporter. We're trying to speed this up as quickly as possible. But they include, as this demonstrative shows, Goldman Sachs Asset Management, BlackRock, Aegon, PIMCO, MetLife, and WAMCO.

After extensive negotiations, in October 2015, the plan administrator and the institutional investors struck a

deal to settle the covered RNBS claims subject to this proceeding as well as a transfer loan RNBS claims for $2.44 billion.

As the Court is aware, the initial indications were that the settlement would be consummated. However, in February 2016, the trustees informed us that they would not accept the settlement, thus, rejecting the institutional investors' views that the claims should be resolved at the $2.4 billion level at that time.

Even after the October 2015 settlement was not accepted by the Trustees, the plan administrator continued negotiating with the institutional investors to resolve these claims fairly and in a timely fashion.

The plan administrator then entered into another settlement agreement with the institutional investors in March 2017 which led to this unique proceeding.

After much negotiation and compromise from the March settlement, the Trustees finally agreed to a revised settlement agreement on June 1, 2017, which established the procedures for this hearing.

That settlement provides the context for why we're here today, Your Honor -- to resolve, as I mentioned earlier, the plan administrator's motion under Section 502C of the Bankruptcy Code to estimate the Trustees' claim at $2.38 billion.

The provisions of that settlement are quite unique. As I just mentioned, I think it’s important to highlight just a couple of points. I went through this in much more detail in my opening but to sum it up, the plan administrator agreed to seek estimation at 2.416 billion, which is now adjusted to the 2.38 billion amount that I mentioned earlier.

As the demonstrative shows evidence, a key feature of that settlement is that the parties agreed that the October 2015 settlement for $2.44 billion between the plan administrator and institutional investors and other settlements in dispute involving RNBS were also allowed into evidence.

Timing. And this is an abridged version of what’s in the provision. But the parties basically agreed they would each have seven full hearing days to present their respective cases so that the Court could issue its decision in time for the plan administrator’s March distribution.

The plan administrator appreciates that this proceeding is somewhat of a divergence from the normal procedures of Your Honor and this Court, and we greatly appreciate the Court’s accommodation. But, again, the plan administrator agreed to this process because it believes this process provided the best vehicle for resolving these claims by the March 2008 distribution deadline, consistent

with its goals to resolve claims in the most efficient, fair, and timely manner possible.

As I described in my opening, this really is an unprecedented proceeding. There are 70,863 loan files for which the Trustees are bringing breach of contract claims here. When the protocol was entered, as Your Honor heard from Mr. Trumpp, the plan administrator aimed to resolve the vast majority of these claims without judicial intervention.

For most of the discovery phase in trial, and you see this on the Trustees from their pretrial brief, the Trustees have maintained that their protocol process was robust, and based on their process, that their claim here is worth $11.4 billion.

However, it became clear through discovery in this proceeding and the evidence introduced at trial that the Trustees' approach to the protocol was fundamentally different than what the plan administrator expected.

The parties clearly have fundamental disagreements about the types of claims, the types of evidence, and the sufficiency of such evidence that was contemplated by the protocol process. As Mr. Trumpp testified, the plan administrator was surprised to see so many atypical claims and so many claims supported with such little loan level evidence.

When asked what his expectation was for the

protocol -- and this is from Mr. Trumpp's testimony, and I'll go through this quickly -- he did not expect to see claims on active loans that are still performing ten years post-securitization; he didn't expect claims for missing documents because, as he understood it, based on customer practice in the industry, that information degrades in the loan file and servicing file over time. He didn't expect claims for the types of regulatory issues that the plan administrator saw from the Trustees; and he also did not expect to see claims for misrepresentation of debts where the additional debt was taken out post origination of the subject loan.

These are just some of the examples identified by Mr. Trumpp at trial and they're on these slides. But we will discuss the many issues that divide the Trustees and plan administrator in more detail later in my presentation. However, just to frame this fundamental difference in approach at the process that both sides employed here at a very high level, here are just some examples, Your Honor, that you saw based on evidence at trial.

The plan administrator expected that the Trustees would have explained to the plan administrator why evidence inconsistent with their claim was outweighed by evidence in support of it and share that information the Trustees obtained from third party sources. So, this is what we

expected to have seen through the protocol process and we did not see this.

Next, we would have expected during the protocol process that the Trustees would have marshalled sufficient evidence to meet their burden for all elements of their contractual claim. We also expected the Trustees would've put into place a much more robust QC program, including supervision sufficient to ensure consistency across five loan review firms.

We also expected that the Trustees would have accounted for the significant period of time that passed since the origination of the loans at issue here before asserting their claims for missing documents, and consider the possibility that the loans may have defaulted for reasons unrelated to the alleged breach.

And, lastly, we would've expected that the Trustees would have pursued claims only on liquidated loans, given that most originations occurred almost a decade ago.

As the Court is aware, the Trustees have been pursuing an 11-figure damages claim for years. Indeed, the Trustees' pretrial brief they asserted, as I mentioned before, that the remedy for Lehman's breaches is a contractually mandated purchase -- repurchase at the approximately $11.4 billion purchase price. And in their opening statement the Trustees stated that they, quote,

"Prefer a methodology that actually evaluates the evidence that we've developed and are submitting rather than one that's based on applying haircuts and discount percentages."

After the record made clear, Your Honor, that the Trustees' process was not reliable and that the Trustees did not --

THE COURT: Can you explain your understanding of what that sentence means?

MR. COSENZA: What I understood that to mean is that the Trustees were going to demonstrate the robustness of their process to show how all the claims that went through the protocol are -- you know, should be paid out at the full purchase price, and that there shouldn't be discounts provided based on quality of evidence or different types of evidence.

THE COURT: Okay.

MR. COSENZA: After the process made clear that the Trustees' process was not reliable -- and, Your Honor, just to take a step back on that question. You know, the context of that statement is in the context of what was in their pretrial brief, which was the full $11.4 billion. So they may have a different explanation for what was there.

THE COURT: Okay.

MR. COSENZA: But that was our understanding sitting there with that --

THE COURT: Fair enough.

MR. COSENZA: They asked for 11.4 and they say we're going to prove it up.

THE COURT: I see. Okay, thank you.

MR. COSENZA: The Trustees did not come close to meeting that burden to show that they had proven valid claims that exceed $2.38 billion. The Trustees have now backpedaled from the year's long pursuit of an 11-figure claim in a different way.

Now, in their post-trial brief, the Trustees pivot and suggest that haircutting may be appropriate. And, Your Honor, this is from the Trustee's post-trial brief. You can see the comparison between -- in this demonstrative, what was in their opening statement and now what they're suggesting in their post-trial brief.

And as the basis for this last minute pivot that's reflected in their post-trial brief, the Trustees point to a, quote, "Demonstrative exhibit that no witness has testified to because it first appeared after live testimony and this proceeding had closed." But it's too late. The Trustees developed no record evidence to support any justified haircutting of their inflated claim.

In any event, this exhibit suffers from a series of fundamental problems and, Your Honor --

THE COURT: This is the so-called -- the

calculator?

MR. COSENZA: Yes.

THE COURT: Okay.

MR. COSENZA: And, Your Honor, I'm going to detail -- I'm going to spend a lot more time at the end of my presentation detailing the problems with the calculator approach. But that's their basis for now for doing this.

In contrast to the lack of proof offered by the Trustees, the plan administrator has provided ample evidence demonstrating why the Trustees' claims should be estimated at $2.38 billion or less.

As the Court may recall in my opening statement I described four guideposts that would lead the Court to $2.38 billion or less. These guideposts are now supported by exactly the record evidence I promised in my opening statement, which I'll describe again at the end of my presentation in more detail -- and they provide, in our view, a sound basis for estimating the Trustees' claims at $2.38 billion or less now.

Your Honor, there was lots of discussion leading up to this about the burden and there's some discussion in the briefs, and Mr. Rollin will discuss that in a little bit more detail during his presentation.

But just coming into this proceeding and where we were, just to frame the issues, the Trustees had the burden

to prove entitlement to more than $2.38 billion in contract damages, but in our view they've utterly failed to meet that burden.

As both parties agree, this is not a put-back case. The Trustees are not seeking to have the plan administrator repurchase any of the loans at issue, including the active loans for which the Trustees seek contractual damages. Instead, the parties are in Bankruptcy Court before Your Honor and as the Trustees acknowledge in the first line of their pre-trial brief, on straightforward breaches of contract claims.

So, the Trustees are seeking monetary damages for breaches of contract in the context of this bankruptcy proceeding.

THE COURT: When the Trustees say that it's a breach of contract claim, they're talking about a breach of the reps and warranties, not a breach incident to rejection of the repurchase agreements.

MR. COSENZA: That's correct, Your Honor.

THE COURT: Right?

MR. COSENZA: That's correct. Consequently, the Trustees have the burden of proof to demonstrate -- again, this goes to what I mentioned earlier, given the magnitude of this case -- 107,311 breach of contract claims on 70,863 loans still at issue that were generated by their loan

review process.

Leading up to this proceeding, the parties agreed that they would not use sampling to prove their allowed claim. In light of that, the Trustees knew that they would need to demonstrate the robustness and reliability of their process.

The evidence showed conclusively that the Trustees were unable to demonstrate the integrity and quality of their breach review process and, thus, the output of that process cannot support a claim greater than $2.38 billion.

As Your Honor heard from Mr. Trumpp and Mr. Grice, there are fundamental deficiencies in the Trustees' breach analysis and that the Trustees' process produced unreliable results.

THE COURT: So, just -- the plan administrator takes a position, and I don't know if I'm getting into Mr. Rollin's area here -- but the plan administrator in broad outline takes the position that the Trustees did not sustain their burden of proof. Right?

MR. COSENZA: Correct.

THE COURT: But for the settlement, therefore, and this $2.38 million -- billion-dollar figure, would it be the plan administrator's position that the claims should be allowed at zero, or would it be the plan administrator's position that the claims would be allowed at, I believe the

number was $300 million?

MR. COSENZA: So, Your Honor, I'm going to address that when I put the context of the introduction to the four guideposts. But I will answer very quickly --

THE COURT: Okay. Fair enough.

MR. COSENZA: I will answer very quickly now. Our view is based on where we were in Steps 1 and 2 in the protocol -- it would be in the range of 278 to 301 but that's not what we're seeking here. Because that was just the first two steps of the protocol.

Our approach here has always been what is fair, and given that there be Steps 3, 4, and 5 of the protocol, what would the protocol have likely yielded? And that's how we get -- regenerate this.

THE COURT: Okay.

MR. COSENZA: So I think I'll explain that in more detail. But based on burden, where we are right now, we do believe just on the plenary view of where the protocol was, we'd be in that range of 278 to 301.

THE COURT: Okay, thank you.

MR. COSENZA: So, at the highest level, Your Honor, the evidence at trial shows the Trustee's breach review process was flawed -- and there's a graphic that's going to go through just general terms of how their process was structured. Mr. Rollin will actually get more into the

loan level issues.

But, first, the Trustees did not properly supervise the five loan review firms. There were no -- it's undisputed on these points, Your Honor. It's on the slide. These are all from the Trustees' witnesses. There were no uniform guidelines that were issued to the loan review firms and how to conduct a breach review, which Mr. Aronoff testified to.

The Trustees offered no specificity as to the content of or parties to the interactions between Duff & Phelps and the loan review firms. No direction was given to the loan review firms on the use of third party sources. And Duff & Phelps made no effort to ensure that all of the third party documentation collected by the loan review firms was retained and passed along to the plan administrator.

Your Honor, at that point, we thought under the protocol we were going to get that information. We never received it. That's just one of the expectations we had, that such information would be passed along and -- passed along to Duff & Phelps, to the Trustees, and then along to us. That never happened.

Second, there were additional problems with the loan reviews. The evidence showed that the Trustees did not have a consistent proper method to calculate actual borrower income. As Mr. Aronoff testified, the loan review firms

were not trying to calculate actual borrower income. And that's really important, Your Honor. I'm going to explain the implications of that later on in my presentation.

Third, there were inadequate quality controls at Duff & Phelps. Mr. Aronoff had no knowledge of how many claims were filtered out of each QC level. QC1 was not permitted to poke around the loan files. That quote has gotten a lot of play from us, both in our opening and during the trial. And QC2 only reviewed the loan files on a spot-check basis. Despite uniform testimony from the experts on both sides, that to confirm a claim was valid you must look at the entire loan file. QC1 also did not review any missing document claims, one of the largest claim categories generated by the Trustees' process.

Next, Your Honor, the Trustees also did not properly consider inconsistent evidence, and Mr. Rollin will detail this issue in his presentation. Despite these gaping holes in the credibility of their loan review process, the Trustees asserted that they would demonstrate their process's reliability through exemplar loans. Again, as we'll explain in some more detail later, that's not what happened during the estimation proceeding. If anything, the reverse occurred.

To put a finer point on this, the Trustees presented seven exemplar loans in their affirmative case

from the 70,863 loans left at issue through Mr. Aronoff's examination. The Trustees handpicked these seven loans, presumably, because the Trustees thought those loans provided the most compelling examples of valid claims produced by the Trustees' process and would best illustrate why their process was sound and reliable.

What we saw, however, was that even among this title faction of loans, seven out of 70,863 or 1/100th of one percent that the Trustees had unfettered discretion to pick for this purpose, several of their exemplars suffered from significant deficiencies.

While the plan administrator expected going into this proceeding -- I think I expressed this to Your Honor at various pretrial conferences, we thought the Trustees were going to present slam-dunk winners and the question would be what would be the implication of that, given the small number of loans that they've selected? Instead, the evidence showed that several of the exemplar loans presented by the Trustees were at best jump-balls.

Rather than provide compelling evidence as a reliability of the Trustees' protocol review process, which the Trustees must do to prove they're entitled to estimation of their claim at greater than 2.38 billion, these exemplars showed that the results of the Trustees' process simply can't be trusted even for the very, very best examples the

Trustees can find.

Mr. Rollin will detail the parties' review processes, including how they dealt with determinations of breach at AMA now, and I mean, I'm going to turn those -- turn the podium over to him so he can address those issues before I come back to complete the plan administrator's presentation. Thank you, Your Honor.

MR. ROLLIN: Thank you, Your Honor.

THE COURT: Hello, Mr. Rollin.

MR. ROLLIN: Your Honor, as Mr. Cosenza said, I will address the divergence of use between the Trustees and the plan administrator on questions of evidence of threshold facts, the application of facts, the representations and warranties, and on the question of AMA. It will necessarily be high level and, of course, I'd be happy to address any questions Your Honor has.

Your Honor, during the protocol the Trustees did not prove at least one required element for the vast majority of claims, and in many instances none of them. And just to highlight these -- the three elements, on the question of threshold facts, the Trustees and the plan administrator fundamentally disagree on what evidence is appropriate to use in this contact and the manner in which one should resolve inconsistent and competing pieces of evidence in and outside of a loan file.

THE COURT: One such an example being a statement on the loan application versus a document that reflects something inconsistent with a statement on a loan document?

MR. ROLLIN: Yeah, that's exactly right. Sure. With respect to the application of the representations and warranties, the parties have fundamentally different views, even of what the words on the page say and how they need to be applied, and we'll talk in a little while about materiality and seller's knowledge, and things like that.

And with respect to AMA, again, we are of completely different views on what the correct standard is, and regardless of what the standard is, what evidence is necessary to establish that standard -- indeed, whether any evidence is necessary at all.

THE COURT: And you're alluding to the fact that you're going to tell me that the Trustees' position is that no evidence is required? That, in fact, once a threshold fact which constitutes a material breach is found for certain large categories of breaches, that then there is an AMA?

MR. ROLLIN: That is one of the issues I will describe, and that is what I mean -- that there's no independent evidence to establish AMA, to measure the increased risk of loss, even if their standard is right -- even though these things are done in the industry and

they're capable of doing it, and they didn't do it.

THE COURT: Okay.

MR. ROLLIN: Now, one thing we do agree on is that the Trustees bear the burden of proof, and that burden looms large in this case. Because when you bear the burden of proof, Your Honor, and you're looking at two inconsistent pieces of evidence, it is your job to reconcile that inconsistency. And when you bear the burden of proof and you have a piece of evidence that says it needs to be independently verified to be relied upon, then what you have to do when you bear the burden of proof is you have to independently verify it. And when you bear the burden of proof and the question comes up, what did a borrower disclose or not disclose in the course of filling out a loan application or in that interaction, and you don't know, you need to find that out. That's what it means to bear the burden of proof. And as Your Honor saw so many times in this case with the exemplar loans, that just didn't happen.

THE COURT: But it's not enough to -- this is a question -- it's not enough to shift the burden of proof merely for the plan administrator to have come up with a hypothesis, a hypothetical explanation for the inconsistency in the file? There was some -- there were some occasions in which there was testimony presented by the plan administrator that wasn't anchored in contrary proof but was

anchored in an alternative hypothesis about what might have happened with respect to occupancy or income and the like.

MR. ROLLIN: I have two responses to that, Your Honor. One is there's an interesting portion in the Trustees' brief where they talk about Mr. Trumpp and his analysis, or as they put it, lack of analysis on certain evidence in connection with the borrower -- and it may have been -- I don't remember if it was the Stanley Steamer borrower or one like that.

THE COURT: Yeah.

MR. ROLLIN: And what they -- what they say is that Mr. Trumpp was hypothesizing. Exactly what Your Honor was concerned about.

THE COURT: Right.

MR. ROLLIN: But when you go back and you look at Mr. Trumpp's testimony, what he's doing is he's actually walking through the evidence. And a comparison of what's cited in the brief and how it's characterized, and what Mr. Trumpp was actually doing -- remember, he was looking at the hospital records and he was saying, oh, this person appears to have been admitted on a stretcher in May of 2007, if I remember correctly. And the issue was, well, does that W2 show the full year income?

They say he's -- in that brief, he's hypothesizing. And, in fact, he's walking through evidence.

So that's my first response to Your Honor's question, is you've got to read, I think, the evidence very carefully and deal with that as -- versus how it's characterized.

Secondly, the problem with the evidence in the first place is it leaves so many holes. So, yes, some things could have happened. The plan administrator, not carrying a burden of proof, is not in a position to know what happened in those evidentiary holes and so that's what we've identified, is that there are evidentiary holes that the party bearing the burden of proof would need to fill to establish that, in fact, there was a breach. That's the issue around corroborative evidence.

We sought corroborative evidence not because you have to have corroborative evidence to meet the burden of proof necessarily; you could come with a single piece of evidence that would be completely sufficient like a deposition, as we did in the downstream cases, or other forms of evidence that you can collect. But when the evidence is so flimsy, then you need corroboration to even meet the standard. And that's why there's this issue around some hypothesizing.

THE COURT: Okay.

MR. ROLLIN: What -- I suppose this is a third piece of that response, Your Honor. What Mr. Morrow testified to was that upon finding some evidence -- and this

was true both for him and for the Trustee's process -- upon finding some evidence or an inference of a misrepresentation, that would take the form of a claim and it would be upon the plan administrator to disprove that. And I do believe that's a burden shift.

It is -- the standard is not to come forward with some piece of evidence, particularly where there are gaps in the evidence and particularly where there's inconsistent evidence. Inconsistence evidence, by the way, which the QC people wouldn't see because if it was considered at all, it was considered in the black box of the loan review firms about which even Mr. Aronoff couldn't testify what happened at the loan review firms. This is not the way the burden of proof works.

Now, it may be the way counterparties to a transaction interact with one another, and this did happen historically between loan sellers and loan purchasers. I see there's a dispute with respect to this loan. And they open up a dialogue. That's what these demand letters between Aurora on the one hand and the sellers --

THE COURT: Okay. So you're getting to a point that's of significant interest to me, which is how this differs from the put-back process when everybody's still alive and kicking. Right?

MR. ROLLIN: Sure.

THE COURT: And what you're saying is that you identify what I'll generically refer to as a problem, something of interest, and it begins a dialogue about taking back, putting back, etc. And it feels that there's something different about that process and this litigation. Is that an accurate -- have I accurately stated your point?

MR. ROLLIN: You have accurately stated -- that's exactly right, Your Honor. In the ordinary course -- I've lived these cases now 11 years -- in the ordinary course, when you have loan purchasers and loan sellers, they have disputes about loans, and they go back and forth about the loans, just like in the demand letters that were shown to Mr. Trumpp.

And, yes, in those instances, Aurora, Lehman, other counterparties would look at a piece of evidence like the Trustees use here in order to initiate that dialogue. Sometimes that resolved things; sometimes it didn't.

When it didn't and the parties went to litigation, that wasn't the standard, and that certainly wasn't the standard that Lehman applied. You'll recall that Mr. Shuster, in asking Mr. Trumpp questions on cross-examination, showed him all of these examples. And Ms. Braswell then on redirect showed actually in those cases, once it got past the pleading stage, the lawyers went out and got evidence from primary sources in order to establish

the actual facts and carry our burden of proof, whether it was borrowers' depositions or affidavits.

Some of these affidavits, Your Honor, were a couple of lines. But we went out and found the borrower, we got the person to swear under oath in an affidavit that they didn't intend to occupy the property, or they didn't make as much money, we offered that into evidence. That's evidence. That's evidence.

That's also consistent with Lehman and Aurora's approach. You'll recall, Your Honor, this document is a 2006 document from Aurora's files. And what it talks about is what did Aurora do in the ordinary course of business in dealing with securitized loans? And these very trusts or trusts like them, for which it acted as the master servicer and the servicer.

And once it got past the quality control level, if there was a claim to be made, what Aurora did -- and Lehman and Aurora were working together prepetition on these issues -- was they would get evidence sufficient to carry their burden of proof in court. There's also a detailed discussion of how we handled AMA in the ordinary course of business. This may be the only document in the case, by the way, that actually shows what industry participants were doing at the relevant time.

And I do want to pause on the distinction that

Your Honor drew a little while ago because it also goes to the question of pleading versus proving a claim. It is one thing to put your counterparty on notice of a claim, to identify some evidence that a person with reasonable beliefs indicates there was a breach of a representation and warranty. It is an entirely different thing to prove a case with that type of information.

And I note in the Trustee’s brief, they talk about -- they said the types of evidence they use was used by Lehman in the same manner. I think that’s the quote. “In the same manner.” It was not used by Lehman in the same manner; it was used by Lehman to open a dialogue, it was used by Lehman to plead cases but it was not used by Lehman to prove cases. That’s a fundamental distinction I think that the Trustees missed.

In response to the burden-shifting point that we’ve made throughout the course of the case, Your Honor, the Trustees have done three things in their brief, all of which constitute other forms of burden-shifting. The first thing they did was they set up sort of a straw burden. They say we acted as though we were requiring proof beyond a reasonable doubt.

They say that we adopted their evidence. And they say that -- they’ve created sort of a presumption around the issue of so-called liar loans. And I want to take each of

those things -- each of those things. They are efforts to shift the burden to the plan administrator once again.

The position taken by the Trustees with respect to a straw higher burden comes from a statement that was made by Mr. Esses. He was recalling a conversation that he had with Mr. Trumpp during the course of the protocol, and he said that Mr. Trumpp said the evidence had to be conclusive. That's not consistent with Mr. Trumpp's testimony on this issue.

But aside from that, it's not consistent with the evidence that we saw during the course of the case. With respect to the exemplars, the Trustees presumably, as Mr. Cosenza said, brought exemplar loans that would be most demonstrative of the quality of their process. 71,000 -- they could draw from 71,000 after the withdrawal of claims. But all we saw was an evidentiary ping-pong match. There's something in the loan files for everybody. They'd point to something, we'd point to something, they'd point to something, we'd point to something. It's inconclusive whether it was -- and not only inconclusive, but much of it was subject to unfulfilled requirements that independently verified the information.

That doesn't meet a preponderance of the evidence standard, that doesn't tip the scales. We weren't trying to hold them to any higher standard than that. And there were

actually quite a number of passes in the protocol. That's where the approximately $300 million number comes from. That's from passes. If we were higher -- holding them to a standard any higher than the preponderance of the evidence -- and I think we were lenient on that at times -- that number would be much lower and I think Mr. Trumpp testified to that effect.

What really happened was that the Trustees failed to meet the burden imposed by law both by giving -- both by shifting the burden and also by giving too much weight to evidence sources of questionable value and not enough weight to either inconsistent evidence or evidence that was actually contrary to the claim in the file, including the loan application itself.

So, one of the things that the Trustees do again in their brief is to say, look, it would've been impossible for us to collect evidence from primary sources. It would take -- if we had to take depositions of borrowers, it would take 24 years.

That is not even remotely our point. Our point is that the Trustees accuse tens of thousands of borrowers of lying on their loan applications, but didn't contact even one. Didn't do that extra diligence to find out whether that was true. It's quite a remarkable accusation when you think about it. They come from this premise that borrowers

make misrepresentations and yet don't do some basic diligence. The tools for that exist. It doesn't require depositions of everybody; it doesn't -- there are much easier means to go about at least testing the theory.

THE COURT: What about in the extreme cases? There are any number of charts that were presented on breaches -- income breaches, and debt breaches, and DTI as well, where you have, you know, 600 times -- you know, 600 percent misrepresentation or 600 times, you know, a DTI. Certainly at the extremes, you're not suggesting that -- you know, where there's smoke in those cases, there's probably fire?

MR. ROLLIN: Yeah. No, not -- on the extremes, not at all. You still have to look at the individual case, you still have to look at the evidence. If they use BLS to say that there's a 300 percent misrepresentation of income, BLS is a -- not a useful piece of information on which to draw any conclusion. And so, sure, at the extremes, if supported by evidence that Your Honor finds sufficiently weighty, sure, okay -- there's no question about that.

The question is on a loan-by-loan basis, did the Trustees find the right evidence source and do the diligence to be able to reach that conclusion?

Your Honor, I spoke of several types of burden shifting. I want to talk about this one. Maybe it's not a

burden shift but it's equally unusual. Slide 19, please? 19. One of the things the Trustees say in their brief is that we've somehow adopted or accepted the evidence because Mr. Trumpp testified using information from Mr. Aronoff's charts. And that's just an untenable proposition.

Mr. Trumpp -- and we have the chart that he was referring to. It's this one. Here, what Mr. Trumpp is saying is that Mr. Aronoff on the Trustee's case relies in many, many instances, either on a single piece of evidence or on a single type of evidence without any type of corroboration from another source to triangulate around the threshold facts and figure out if it's more likely than not true.

This is in no way an endorsement of the information. And it's certainly not unusual for a party in litigation to point to the other side's evidence to demonstrate how weak it is. That's what was going on here. It is an incredible stretch for the Trustees to suggest that by doing this or pointing to other pieces of evidence that they've offered in demonstrating its weakness, that we somehow endorse that.

And I don't know how you can go through the months of trial and the years of exchanges in the protocol that we've gone through and come away from that with the conclusion that we somehow believe that the evidence is

reliable or sufficient to carry the burden of proof.

THE COURT: Okay, so let me make sure I understand what you're saying. I think this is an important point. This is -- this is an Aronoff exhibit that summarizes evidence types?

MR. ROLLIN: This is a Trumpp exhibit assembled from information provided by Aronoff.

THE COURT: Right. But the underlying exhibits are Aronoff exhibits.

MR. ROLLIN: That's right, yes.

THE COURT: They are Mr. Aronoff -- they are bucketings by Mr. Aronoff of types of claims, income debt, employment occupancy that are separated out into here's the type of evidence that the Trustees are relying on for these claims?

MR. ROLLIN: Exactly right.

THE COURT: Okay. So -- I mean, maybe this is for me to take up with the Trustees but I have a hard time understanding the statement that they're relying on. What Mr. Trumpp's point was, that was pointing out that according to Mr. Aronoff, here's the support for these claims. That's it, right? I mean, I'm just trying to understand this.

MR. ROLLIN: That's it. That's right.

THE COURT: This has kind of mystified me from the very beginning. But you have no -- Mr. Trumpp nor any other

plan administrator export -- expert has any basis... So, just to look at the first one where you're looking at income claims, Mr. Trumpp is not saying that he independently has verified and agrees with the fact that for 35 claims, Accurint is cited in support of the claim?

MR. ROLLIN: That's true.

THE COURT: It's just -- right?

MR. ROLLIN: It's just sorted from --

THE COURT: It's just sorted from Mr. Aronoff. It's just Mr. Aronoff's sorting?

MR. ROLLIN: That's right.

THE COURT: Okay.

MR. ROLLIN: That's exactly right.

THE COURT: All right.

MR. ROLLIN: And, of course, Your Honor, there's nothing about our presentation at any time in this case that suggests that we think that this -- that these sources, particularly when you're relying on one source, is adequate.

THE COURT: These are one-source claims, right?

MR. ROLLIN: That's right.

THE COURT: These are -- each of these are one-source claims. So there's not -- where there's employment evidence and occupancy evidence? There's not both?

MR. ROLLIN: That's correct.

THE COURT: This is single-source support?

MR. ROLLIN: That's right. That's exactly right. Your Honor, as we've shown throughout the course of the hearing, the third party sources that the Trustees rely upon are particularly weak forms of proof. We showed, for example, that they have disclaimers and warnings. They don't know in some cases even the source of the information, and they're certainly not vouching for it themselves. They say that it's to be independently verified before relied upon.

It's true with respect to these. The next slide is Accurint. It's also true with respect to credit reports. I know Mr. Aronoff testified that there's -- credit reports are used. Of course, credit reports are commonly used, but they're usually not used in isolation. And, in any event, the credit reporting agencies themselves acknowledge that the information is not necessarily error-free.

THE COURT: So, if I were to agree with you on this point and effectively give effect to the legal disclaimers, which would lead me to give no effect to the use of this type of third party information that's supporting the claim, would I be the first judge in the history of put-back litigation to take that position?

MR. ROLLIN: I can't answer that question. I know that there is an opinion that I believe that the Trustees cite and what it says is -- and nothing more than this, and

we agree with that -- is that these are admissible. You can consider them. We agree that you can consider them. We considered them throughout the protocol. There was no evidence type -- and Mr. Trumpp testified about this -- that we automatically dismissed.

Even BLS, we would consider it in the mix of the information, and we would consider this in the mix of information, but we would also do something that the Trustees didn’t do: We would consider its -- the problems with its reliability.

The Trustees take it as true. Mr. Morrow confirmed that. I believe Mr. Aronoff confirmed it as well. They take this as true, notwithstanding the caveats, notwithstanding the disclaimer language, notwithstanding the requirements that independently verify that the companies themselves advise people of.

It’s not only, by the way, the third party sources, because even information within the loan files is not necessarily conclusive of any particular fact and has to be viewed in light of the entire mix of information. We talked about -- Mr. Cosenza spoke briefly about the fact that the Trustees didn’t verify income. And he’ll talk further about the ramifications of that. We also saw instances where the Trust --

THE COURT: I think you misspoke. The Trustees

did not determine actual income. You said the Trustees didn't verify income.

MAN 1: That's correct.

MR. ROLLIN: Well, it started one way and then it moved to something else.

THE COURT: Right. It morphed a little bit.

MR. ROLLIN: That's right. First, in their initial slides, Mr. Esses said that they verified actual income. I don't think that held any water. And so they later said we weren't trying to verify actual income; we were coming up with a referent or reference income in order to create DTI calculations and tolerances.

THE COURT: Yes.

MR. ROLLIN: The Trustees -- we saw an instance or two where there was a preexisting debt that was allegedly undisclosed, but that debt had been closed by the time of origination. A very good example we saw was the VOE. Remember the Employment Development Department where the person wrote in their application that they were a senior project manager of litigation? This is a primary document in the loan file that was misinterpreted. And these are just a few examples in the interest of time.

Now, Mr. Aronoff, by the way, on this one, after quite a bit of discussion both with me and with Your Honor, admitted that it was a mistake. And, in fact, mistakes

happen but that's not the headline here. That mistakes happen in a process like this is not the headline; the headline is that the process wasn't designed to get down to the actual threshold facts and then support them in court to establish a breach of contract case.

The other issue I'll raise very briefly, again, in the interest of time is this argument in the Trustees' brief that these are liar loans. That because they were originated at a particular time, the borrowers necessarily lied. And they create -- this creates a false presumption that we somehow need to get over that there are misrepresentations in the loan applications. And it really reveals a key issue in the Trustees' process -- is that they go into this thinking that there's a misrepresentation. And when you go into an analysis thinking there's a misrepresentation, that's going to frame your view of whatever evidence you might find in your third party sources or when you find something in the loan file.

THE COURT: What's your basis for characterizing the Trustees' lens this way? What's your basis for that?

MR. ROLLIN: The Trustees talk in their -- I believe the context in which they raise it is not giving any credit to the loan application.

THE COURT: Okay.

MR. ROLLIN: On a presupposition that the loan

applications are false. There's zero record evidence for that presupposition and it constitutes creating this presumption and, again, this lens that infects the way they look at the loan file and they look at the evidence that the find in the third party sources.

We saw plenty of instances in the course of just the few exemplars where the borrower hadn't made a misrepresentation at all, the evidence was misinterpreted, like the VOE, like the borrower -- you'll remember the borrower that lived in Washington, D.C. and was going to move to Arizona. And what was not in the claim package and what was not shown to the witness was the letter from the borrower's employer saying, acknowledging that the person was moving to Arizona and it wouldn't affect his income.

There was the nurse -- there was a lot of speculation by Mr. Aronoff about her credit card debt and her bank account balance aren't consistent with somebody who should -- who's earning what they say that they earned, and, in fact, she was caring for elderly and ill parents in the Philippines and her high-school aged brother.

There was the gentleman who had the HVAC business and there was the question about how did he know what, off of his Schedule C he was supposed to write on the loan application? Holding regular people to a standard that they're supposed to somehow understand exactly what Mr.

Aronoff thinks they were supposed to write down.

There's no evidence that these people are liars or made misrepresentations at all. There's evidence that the Trustees interpret documents in a certain way and they interpret them as being misrepresentations. By the way, those last three, those are Trustee exemplars -- those last three examples: The nurse, the HVAC, and the person who moved to Arizona.

Your Honor, there's this narrative that we've identified isolated mistakes. There's no evidence that these are isolated mistakes. There's no evidence -- the narrative is these are isolated mistakes and, therefore, everything else in Mr. Aronoff's charts are true and you shouldn't allow a claim based on all of that. But there's no evidence beyond that.

What you saw where the exemplars, and even the Trustees' exemplars demonstrated flaws, deep flaws in their process in the way they went about doing this analysis.

Once you get past the threshold facts you have to deal with the breach analysis, and I'm going to skip over this as much as I possibly can to move along. But when you do the breach analysis you have to read the words in the representation and warranty. For the no-default and the no-fraud reps which deal with the Big Four, you have to read the word materiality and you have to give it some

application. You have to read in the no-fraud rep the requirement to prove seller's knowledge.

But instead of doing that, they rename it. They don't want to call it the no-fraud rep anymore; they want to call it the no-untrue statement rep so they can separate out, surgically cut out the last sentence of the representation and warranty that says that you need to show seller knowledge.

On the question of materiality, just to focus on this, Mr. Esses testified that the credit decision is guided by the underwriting guidelines and by the product profiles. Those are the documents that tell underwriters when to approve a loan and on what terms. And yet, he also testified that the Trustees did not review the underwriting guidelines or the product profiles in connection with making their materiality decisions. That's a critical omission. That's -- those are the documents that matter in that determination.

Now, they did review with respect to three trusts but only with respect to underwriting claims, most of which have been withdrawn. But even then, as he conceded, they used the wrong set of guidelines.

Moving on to AMA.

THE COURT: Moving on to what?

MR. ROLLIN: AMA. I'll do this as quickly as I

can, Your Honor. There are three issues I'll touch on. The first is the parties just read the provision in the contract very differently. The second, the law -- the parties read the law very differently. And, third, I believe the Trustees don't consider the applicable commercial context. And this goes to whole loans and securitized loans, and I'll hit each of those topics.

One of the things the Trustees did very little of during the course of the case is talk about the specific language of the AMA provision. They talked a lot about what they thought it meant but not what it said. And I want -- there are a number of issues, interpretive issues, but I really just want to focus on two.

The first one is that under a plain reading of the contract, the finding of a breach is separate from the finding of AMA. That's what Judge Castel found, and that's just obvious from --

THE COURT: Well, Mr. Aronoff said he was wrong. Did he not?

MR. ROLLIN: Mr. Aronoff believes that the judge is wrong on that. But if you don't want to rely on Judge Castel you don't have to because you can just look at the language. It says breach, that adversely and materially affects the value of the loan. If the drafters didn't want to have a separate consideration of AMA they could've just

struck that and that's effectively what Mr. Aronoff does in his analysis.

There was a point in time, Your Honor, in the case where you asked Mr. Aronoff something and he -- and you said, are you talking about materiality of the breach or are you talking about AMA? And I was on the edge of my seat. I couldn't wait to hear the answer to this question because it's been conflated and merged throughout. This was true at the beginning of the protocol, through the protocol, and through this entire case.

THE COURT: So what was his answer?

MR. ROLLIN: I think he said AMA. I think he said it was AMA in that instance. But it didn't really matter because they mean the same thing. That they mean the same thing is actually reiterated in the Trustees' most recent brief. There's a section where they talk about -- Page 20, they talk about what is breach level materiality. And they talk about it going to the credit risk of the loan.

And then they drop a footnote, 17, and they say credit risk goes to AMA, also. That's exactly right. They interpret them to mean the same thing, even though the drafters of the contract have them as different things.

Now, the second interpretive problem goes to timing, the timing of the AMA analysis. As we've talked about, the word affects is in the present tense. Does the

breach adversely and materially affect upon discovery -- right at the beginning of the sentence... At the beginning of the AMA provision it says upon discovery, and then it says affects. That's the drafter's tie -- the present tense affects to the period of time upon discovery, which is sometimes months or years after origination. But they -- if the drafters wanted it to go back to the time of origination, which is what Mr. Aronoff and Mr. Morrow said they were supposed to do, it should've said affected or it should've said at the time of origination or at the time of securitization, and it doesn't say those things.

And so by reading it in that way, the Trustees omit from their analysis all of the intervening events that affect the value of the loan, and they importantly affect -- omit the importance of loan seasoning. Mr. Castro cited to credit rating agencies -- talks about how important loan seasoning is to predicting future performance, such that once you're past 18 months or so, the original refs are significantly of less value in determining the future performance of the loan.

And, frankly, those interpretive errors are dispositive on the issue of whether the Trustees have submitted proof to establish AMA. If you misread by conflation or you misread by doing the analysis at the wrong time, that demonstrates the failure of the Trustee's proof.

THE COURT: Is it the plan administrator's position that if I were to disagree with you on how to determine threshold facts and material breaches, and to find that based on some combination of the exemplar loans, the robust process, and using the charts and the calculator, that they have, in fact, established every single material breach, right -- you would say, nonetheless, they still lose because their AMA analysis was entirely flawed? Is that true?

MR. ROLLIN: Yeah. That's true. Now, I suppose -- you talk about individual loans and the detail but, again, it's still loan-specific. But in terms of what evidence have they produced --

THE COURT: But that's my point exactly. My point exactly is that if I were to find that they -- that they have carried their burden of proof with respect to breach, you would nonetheless say that they haven't carried their burden of proof with respect to AMA because the entirety of their AMA case is material breach equals AMA?

MR. ROLLIN: With two exceptions.

THE COURT: Okay.

MR. ROLLIN: One, loans that the plan administrator has already approved within the 300 million.

THE COURT: Right. And deemed AMA?

MR. ROLLIN: And two -- and deemed AMA. That's

right.

THE COURT: Actual deemed AMA?

MR. ROLLIN: That’s right. That’s exactly right. Now, Your Honor, the reason that the Trustees didn’t apply the right standard is because they drew it for monoline cases. I’ll speak briefly about the monoline cases and why they don’t apply here.

In the monoline cases, the protection that’s afforded to insurers is rooted in New York insurance law. In MBAI v. Countrywide and other cases, the courts concluded that monoline insurance had a statutory right under the NYIL to accurate disclosures from the loan seller.

By the way, that standard has been carved back quite a bit in subsequent cases. Those are early monoline cases wrestling with this issue.

By the way, that standard has been carved back quite a bit in subsequent cases. Those are early Monoline cases wrestling with this issue in the first place, since the laws are somewhat all over the place.

Importantly, in Syncora Guarantee v. EMC, the Court said that insurers have a legally distinct interest from investors or trustees. But the Trustees, at no time, have explained how that legally distinct interest should be imported into this case.

Now, there are some non-Monoline cases that the

Trustees cite that apply a risk of loss standard, but none of those courts have wrestled with this issue. They've not analyzed the insurance law origins of the risk of loss; they've not considered the legally distinct interest; they've not explained how you can bring 3105 and 3106 of the Insurance Law into a non-insurance context. I call that Monoline creep.

THE COURT: Monoline creep.

MR. ROLLIN: That the Monoline case law has crept into non-Monoline cases, which out explanation.

THE COURT: Sounds like a horror movie, the Monoline creep.

MR. ROLLIN: We'll see. But here's what -- I want to take a step back about this Monoline issue because I think it's important, Your Honor. In 2014, the Trustees were presented with the opportunity to settle another large RMBS case; this one was with J.P. Morgan across hundreds of trusts.

And on the one hand, they had investors who were saying, risk of loss, risk of loss, the standard is risk of loss. And on the other hand, they were dealing with banks who were saying, no, you have to prove that there was a strict default; there's a strict default requirement. And, by the way, they suggest that we hold them to a strict default requirement, which we do not.

But that was the situation the Trustees were presented with when they went to settle this case with J.P. Morgan. And so what they did was they went to a respected jurist, Judge Carpinello, and they asked him, what do we do under New York law with these competing views?

And he issued a report to the same Trustees -- and he, by the way, was hired in this case to evaluate the 2015 settlement. And what he told them was, the banks are wrong. It is not a strict default standard, but it does -- there has to be some proximate causation to a harm or damage.

But importantly, what he said was, the investors are wrong too. It's not risk of loss. Risk of loss applies to Monolines, not in a non-Monoline context. And that's the opinion that they had; that's the opinion they submitted to Justice Friedman in the Commercial Division to have that settlement approved. And that's the information they had when they came to this case.

But instead of taking that same position, the position they took was the investor's position -- risk of loss, risk of loss, risk of loss -- and try to convince Your Honor that that's the standard under which you should decide this case.

Now, briefly, about whole loans and securitized loans. There's been a lot of talk about the distinction between the two of them. What Lehman has done in its

downstream cases when it held whole loans, and how the question of AMA should be analyzed with respect to securitized loans.

And according to the Trustees, a loan is a loan is a loan and it doesn't matter. But the truth is, a loan is a way of making an investment; it has a commercial purpose. And so, when a loan is a whole loan, it has a price because you're trading it. And different things -- lots of different things affect its price or its value.

You could even see that in Dr. Elson's model; 55 different inputs affect price. One or two maybe related to breach; lots relate to other market factors and supply and demand and things like that. But in a whole loan context, you can measure a price and you can measure its diminution in value by virtue of breaches and anything else.

The securitized loan can't be sold. The Trustees can't sell a securitized loan, it would violate the IRS Code. Even Dr. Elson conceded there's no market for these loans. Its value isn't measured in a price. Its value is measured in its ability to produce cash; that's what investors want out of it -- produce cash. And the longer it performs, the more cash it produces, particularly in interest.

And so, they are different, and the estate has always treated them and recognized that difference.

THE COURT: But wouldn't the Trustees say that you're exactly right. And that a borrower who has massively misrepresented income or debt is far less likely to repay the loan, which means that the cash flow on which the certificate holders are relying, is less certain. So they would say, you've conceded their point. Isn't that what they would say in response to that?

MR. ROLLIN: Well, that turns on adopting a risk of loss approach to the question in the first place. The point is, and Mr. Castro makes this point, that the longer a loan performs, the more value investors get out of it. And so, maybe you have an increased risk of loss, but we don't believe that's the right standard. But even if you had an increased risk of loss, something that happens in the future, that's not the role of it.

THE COURT: Well, but then we get back to the point in time at which you should determine it. Because they would say that if you're taking your slice at origination, the future is irrelevant. You say under the governing documents, you're not looking at the slice -- the snapshot, rather, at origination; you're looking at the moment the conversation around the potential default begins, right?

MR. ROLLIN: And not only under the governing documents, Your Honor, but under the commercial practice of

the party. One of the things we cite, I think it's in our brief, is in 2011 when we had an objection hearing in front of Judge Peck, one of the things that counsel for the Trustees, one of the points that they made is why would we take a performing loan out of a trust and look to see whether there's a defect; it's producing cash.

So it's not just how you read the contract; it's how the parties actually act in the commercial reality in which these loans live.

Even assuming a risk of loss standard applied, there's no proof that there was a significant increase in the risk of loss, which is the standard that the Trustees say applies, or that there would be any price change and certainly not by the breach. As I said, many factors -- and there's testimony in Mr. O'Driscoll's designations that we'll submit to you.

THE COURT: I was going to say that.

MR. ROLLIN: They're coming.

THE COURT: Still coming, okay.

MR. ROLLIN: They're still coming. That many factors affect the risk of loss. We start with a baseline risk, and then you have to measure it to determine whether or not there's been an increase that's sufficient to trigger AMA, even under their theory.

And I -- Mr. Castro describes in his report the

fact that you have to consider lots of factors, that there are models to do this. And one of the things the Trustees said was, this is -- Mr. O'Driscoll called it a castle in the sky. It's imposs- -- it's would be impossible to ever pursue a repurchase claim if you had to consider many factors that could lead to an increased risk of loss, and then measure the difference between the baseline and the revised breach base risk of loss, and that fell apart in deposition.

And I'm going to apologize in advance. We have a clip of Mr. O'Driscoll that Your Honor has not had the opportunity to see. And I'd like to show it because it bears directly on this issue of the Trustees have the tools to quantify a risk of loss and failing to do so.

[VIDEO PLAYS]

Q And you write Eisner, all that Mr. Castro has created a test that (indiscernible) cannot be passed, right?

A Yes.

Q There's no methodology that could apply a multifactor test to quantify the risk of loss.

MAN 1: Objection to form.

A You know, tests I've ever been in all the time, but not in the context of this industry.

Q What's this industry?

A The industry during the relevant period over

which purchased loans in bulk and securitized.
Q So when are tests like that done all the time?
A If I got a test like that be done all the time.
Q You just testified no tests like that are done all the time, but not in the context of this industry.
A Maybe if there is a test like that, why don't (indiscernible) them.
Q In what context?
A In the context of evaluating the performance of other (indiscernible).
Q And you quantify the risk of loss in different scenarios, don't you?
A That's hard to generalize, but some would, some would not.
Q Meaning some firms would and some firms would not.
A Yes.
Q What's in (indiscernible).
MAN 1: Objection, calls for speculation.
A It's certainly possible.
Q Not only possible, it has been done in your experience.
A It's been done for -- it is a tool that is

used for (indiscernible), yes (indiscernible).
Q So the answer is yes. It's not only possible, but it has been done in your experience.
(indiscernible)
Q You performed a multifactor analysis to estimate attempt to quantify the risk of loss in your different scenarios, right?
MAN 1: Objection to form (indiscernible), vague, ambiguous, (indiscernible).
A One can and people do built models to quantify the risk of loss far more (indiscernible).
Q How's the risk of loss (indiscernible). In fact, you can and have built models to quantify the risk of loss in mortgage (indiscernible) case, haven't you?
A Yeah.
Q Have you been involved in the construction of such models?
A Yes.
Q In what role?
A In working with our public asset backed securities research teams, who built a model to quantify losses for -- that investors did produce as a tool to evaluate our investors.
Q It's evaluated loss of line it is.
A Yes.

[VIDEO ENDS]

MR. ROLLIN: Your Honor doesn't have to pick a standard; they haven't met their own standard. They can do it; they didn't do it. Your Honor, that concludes AMA. I have a brief discussion on-hold loans.

THE COURT: Okay.

MR. ROLLIN: All right, on AMA and a very brief on-hold loans.

Your Honor, as we explain in detail in our brief and it's some -- as we went over at some length with Mr. Esses, there is a group of loans that were set aside as incomplete because they were missing one of four -- one or more, four critical documents to the plan administrator's review: servicing notes, payment history, loss certifications, and corporate expenses.

When the Trustees submitted partial filings during the protocol, the plan administrator had to make a decision: were we going to expend resources on doing a partial review of a loan; or were we going to set those aside and then do a full review of the loan, if and when the Trustees produced all of the necessary documents? So we decide to do the latter, put in on hold, and save the resources for -- and be more efficient in that regard.

As we've talked about the four critical documents, two of them go very much to AMA, the servicing notes and the

payment histories are view of AMA, of course, and two of them go to being able to validate the damages numbers. You remember, Mr. Esses testified that the Trustees didn't validate any of the damages numbers that they got from the servicers at all; they just copied them from one spreadsheet into another one. And so, the plan administrator wanted to be in a position to audit those numbers and insisted upon those documents.

We only required four out of the 41 in the protocol. Those were all documents that -- or information that the servicers keep in the ordinary course of business. Mr. Esses had to ultimately acknowledge that this is the type of information that servicers keep.

Mr. Burnett, the servicing expert who was also taken off of the list, confirmed that as well based on his servicing experience, and you'll see that in the designations.

Your Honor offered your own assistance to the Trustees -- they didn't take it -- in getting these documents. They didn't send subpoenas. In two instances, I think, where they did send subpoenas for origination records, those subpoenas were very effective. And I think sending subpoenas would have been effective to obtain the information from the servicers as well, but that's not what they chose to do. And so, the parties placed those loans on

hold, and you may remember, by agreement.

We would now ask -- we certainly think it's not reasonable for the Trustees to suggest that all of those claims are valid and should become valid claims. Because they weren't reviewed particularly under those circumstances, we would actually ask the opposite.

The Trustees didn't comply with the terms of the protocol in terms of what they needed to produce; they didn't follow the procedures that were available for them to follow; and we'd ask that those be disallowed.

I'll turn it back over to Mr. Cosenza.

THE COURT: Thank you.

MR. ROLLIN: Thank you, Your Honor.

THE COURT: Let me ask. I'm fine to keep going. But would folks like to take a brief break? I'm getting a yes from this person sitting right below me. I won't cut you off at 2:30.

MR. COSENZA: I'm find with taking, if you need a break. I'm ready to go, whatever.

THE COURT: Okay. Would you like a break? Sure.

MR. COSENZA: Okay. That'd be great, Your Honor.

THE COURT: Let's take a 10-minute break for everyone's comfort, and we'll resume at 2:00. All right?

MR. COSENZA: Sure.

THE COURT: And if it goes a little off, we'll

repay the favor tomorrow. All right?

[BREAK]

THE COURT: I got detained by a Monoline creep. That is definitely going to be my Halloween costume next year.

MR. ROLLIN: You're welcome, Your Honor.

THE COURT: Who's that, Mr. Rollins? Well, maybe Mr. Shuster can come up with something equally pithy tomorrow.

MR. COSENZA: Knowing him, he will.

THE COURT: And just let me say that we'll be very happy to have -- that the circumstances are such that we're going to have Mr. Shuster back with us tomorrow. Okay, Mr. Cosenza.

MR. COSENZA: Okay. Thank you, Your Honor.

Your Honor, while the parties disagree on many things about the record in this case and the nature and the validity of the Trustees' claims during the protocol, there is one issue on which both sides agree. The Trustees made no attempts to establish a nexus between the breach claims they submitted to the protocol and the losses on the loans that they sought to recover as damages for their claims.

Mr. Esses made this point very clear during his trial testimony, and here's the relevant excerpt. He was asked:

Q On losses to the trust on account of any of these loans could be caused by something completely unrelated to any conduct of a debtor, right?

A It's possible, yes.

You don't know that.

A I don't know that.

Q It wasn't part of the Trustees' process to find that out.

A That is correct.

Q And yet, you asked the Lehman estate to compensate the trust for all the losses, right?

A Yes.

MR. COSENZA: So what does this mean in the context of what's been going on in these proceedings? This has been an issue that hasn't been fully discussed before Your Honor, but I think there are origins in this case that we did back in 2014.

It means that the Trustees are asking the Court to order the estate to pay them for damages that Lehman did not cause. And, Your Honor, whether viewed under the perspective of AMA or from under the MLSAAs or under black letter law, the Trustees may not avoid the requirement that governs every breach of contract case. A plaintiff must establish some nexus between the breach and the claim losses.

During trial, the Court heard a number of hypotheticals that were posed to Mr. Aronoff and other Trustee witnesses that made crystal clear that the Trustees would assert breach claims for the full purchase price, even if the evidence clearly demonstrated that the breach did not cause any loss.

I won't repeat all of those here, but I just want to emphasize that the absence of this nexus is not a hypothetical problem. The Court heard examples of borrowers who were unable to meet their loan obligations for reasons undeniably unconnected to the loan application. The employee who developed cancer; the wife and the baker in New Hampshire whose husband passed away and wasn't able to make the monthly payment -- that's an active loan, by the way; and the real estate agent whose business collapsed, just to name a few.

But the implication of the Trustees' positions were far reaching and not limited to circumstances that involved unfortunate life events of borrowers. For example, the Trustees submitted tens of thousands of missing document claims that they say entitled them to recover the full purchase price of the loan. If the Trustees could not find an appraisal in the file, the Trustees would bring a claim in the full purchase price of the loan. If the appraisal is missing pictures, we heard testimony, the Trustees would

bring a claim for the full purchase price of the loan. If the Trustees could not find a truth in lending verification or a HUD-1 form in the file, again, the Trustees would bring a claim for the full purchase price of the loan.

It's hard to imagine that missing appraisals or tills or HUD-1 disclosures had much to do with causing the losses on any significant number of these loans.

In short, the evidence at trial demonstrate that the Trustees' position that there be no nexus led them to submit untold tens of thousands of breach claims in the protocol. The Trustees now ask the Court to allow them to collect damages under a rejected contract in bankruptcy without any proof of a nexus between the claim breaches and the asserted losses.

THE COURT: So let's stop and focus on this because this is -- I think this is an important point. Does the plan administrator believe that there should be a different analysis leading to a different result here because we're in a bankruptcy, then if this were being conducted outside of the bankruptcy?

And I'm not talking about the points around post-rejection interest and post-confirmation interest. I'm merely talking about the construct of a rejected contract, right, is deemed a breached contract.

MR. COSENZA: Yup.

THE COURT: And in bankruptcy, you're entitled to assert prepetition -- it's deemed a prepetition breach, et cetera, et cetera. You're all familiar with it.

So should this putback litigation, should this lead to a different result under a different analytical framework on that point because it's here versus elsewhere? Also, putting aside the fact that the claim's going to be paid in bankruptcy dollars versus hundred-cent dollars, which absolutely has no bearing on it.

I mean, just to be clear, and I don't think the Trustees dispute this. The fact that what we are driving towards is an allowed claim, as opposed to a hundred-cent dollar cash price, has no bearing. You don't get to gross up your claim because you're not getting paid in one-hundred cent dollars. But just on the question of the bankruptcy framework, shouldn't I come to the same result -- should I or should I not come to the same result that I would if I were sitting at some other -- in some other court.

MR. COSENZA: So, Your Honor, I have a twofold response. I think the answer is yes, you would come to the same result. I think there's an additional issue here in terms of the equities, in terms of a lot of the cases that have been cited by the Trustees really talk about situations where they're trying to use the purchase price as a proxy for damages is because those loans had defaulted, and you

can't really use the repurchase remedy. And they basically say, well, we're going to enforce it basically as a super-performance using the proxy of the purchase price.

THE COURT: Right, it's a proxy, right.

MR. COSENZA: And part of that rationale is they want to want to make depositors do not act in that manner, and to make sure that they are held accountable for their misconduct.

And in this case, you know, that's an equitable consideration that should be held against Lehman because Lehman doesn't exist anymore. We're just the plan administrator acting on behalf of all creditors. So that equitable consideration that was considered in those other cases to enhance the remedy against the depositor and the sponsors; that's not a factor that should be used against us.

So I think as -- my point is, it's the same legal framework. I just don't think, you know, that there's equities to be considered here. And I think why I'm bringing up this issue of nexus in the context of the equities is that there's this gaping hole in the evidence that's never been presented.

And it just, based on how things were set up in the frame -- in the protocol in 2014, there was an understanding, as we described to Mr. Trumpp's slides, that

there would be some level of evidence here to try to cause a link between the breach and the harm that they're seeking to -- that the Trustees are seeking to be compensated for. And here, there was just an absence of proof.

And, frankly, Your Honor, I understand what happened in the protocol, but they doubled and tripled down on that approach. During expert discovery and also during trial, they never put any witness on to explain this and how this works and why they're not getting a windfall; they just said, we just get the full purchase price.

So there are many, I think, levels to this. And, frankly, we've struggled in trying to articulate this to you because it's purely a legal issue in some sense, so you can't explain it during much of the testimony.

THE COURT: Testimony, right.

MR. COSENZA: But that's, and I think we've tried to cover this in a little bit more detail in our brief and I'm happy to have this colloquy with you. But that's how I think -- why it's important in this context to consider that Lehman doesn't exist anymore. And, you know, to punish or to hold Lehman accountable is -- you know, the way the other courts have held depositors and sponsors just doesn't make sense here.

THE COURT: Okay.

MR. COSENZA: So, Your Honor, moving on, I think -

- by the way, your question, I expect through the next few points in my outline, so moving on.

THE COURT: All right.

MR. COSENZA: I'm trying to be fast. I'm going to move on to the drawn loans and claims.

THE COURT: Sure.

MR. COSENZA: Excuse me, withdrawn loans. In addition to all the problems with the Trustees' process and the claims they submitted during the protocol that we have discussed earlier, when expert's reports were issued in this case, the Trustees abandon 15,107 loans and 72,088 claims that were put through the protocol.

This represented approximately 40 percent of the claims the Trustees submitted to the plan administrator for review and analysis. The Trustees withdrew these loans and claims without any notice or explanation and left it to the plan administrator to figure out that the Trustees were no longer pursuing these loans and claims based on their expert submissions on June 1, 2017.

As the Court is aware, when the plan administrator asked for an explanation for the dropped claims back in July of 2017, the Trustees cloaked that decision in privilege. And this -- here's the letter the Trustees sent to us about that decision.

The Trustees maintained this position through

trial, and none of their witnesses testified about the withdrawn loans and claims. The Trustees asserted in their pretrial brief that they withdrew these claims to streamline their case. But that rationale does not pass muster, and it does not answer the question of how their process could have generated so many claims that were so easily dropped.

Mr. Grice compared the loans the Trustees withdrew with the loans that remained at issue. He could not distinguish meaningful differences between the two groups and could not determine why the Trustees withdrew the loans they did. This is a slide, Your Honor, as part of Mr. Grice's report. And as Your Honor can see, the Trustees withdrew claims across all major categories and continued to pursue 31 categories of breaches. So there's no streamlining of this proceeding through the withdrawal of the claims.

Despite the Trustees shrouding this highly material decision in secrecy, the plan administrator did the best it could through Mr. Grice to address the significance and implication of that decision.

Your Honor, I'm not going to walk through the details of this, but you may recall this slide from Mr. Grice's testimony. The slide shows that there are 1,977 till claims that were withdrawn. And based on Mr. Grice's audit, there was no way for him to discern a difference

between the loans that remain in the case and the loans that were withdrawn by the Trustees.

Mr. Grice also testified that he did not understand why 20 percent were withdrawn and not 100 percent. And during his examination, Mr. Grice was asked the following question about whether he could opine on a process where 40 percent of the claims were withdrawn. And Mr. Grice testified, it's hard to imagine how.

Mr. Grice further testified that the impact of the Trustees' withdrawal of 40 percent of the breach claims and what it tells him about the breach claim process. He testified, obviously, that it's unreliable in the sense that it's changing.

So what do the Trustees say about this in their post-trial brief?

THE COURT: What about the -- I mean, I do recall the Trustees' argument on this point. Which was basically that all of the breach claims in the original submission fit the target if we're playing darts. They all the target, right? But that what they merely elected to do was to concentrate on the bullseyes and the next area out. I'm not familiar with darts.

But the point is that they -- I think they were trying to make was, look, all these claims are good and we're just going to focus on those that are great. So why

shouldn't I accept -- and I think that's their argument.

MR. COSENZA: Yeah.

THE COURT: I'm sure Mr. Shuster will correct me if I got that wrong. So why shouldn't I accept that as an adequate explanation?

MR. COSENZA: So, Your Honor, as we saw in those charts, they withdrew the claims across all the categories. The ones that remain in the case are not different than the ones that were pulled out; it's the result of a flawed process. We've continually asked for an explanation from the Trustees, and they cloaked it in privilege.

So moving on, that's why I think just this idea of just them pulling out ones that they through were not in the bullseye, you know, from our perspective doesn't make any sense. Because when you have a process that was set up in the way it was set up by the Trustees, to just disavow that many numb- -- 40 percent of the claims and say, oh yes, we got it right now, without understanding what they did and how they did and cloaking it in privilege, to us, just simply doesn't make any sense.

And, Your Honor, they actually turned -- the Trustees --

THE COURT: Can you remind of the level of Mr. Aronoff's knowledge? Mr. Aronoff just knew that he was to work with those claims that were left, right?

MR. COSENZA: That's my understanding, correct.

THE COURT: So he came into the picture post-withdrawal of those claims. So he did not have any -- he was not asked to, nor did he himself have any insight into what was withdrawn, correct?

MR. COSENZA: That's correct, Your Honor. So, Your Honor, I think I do want to hit on this very quickly, jumping around the comment that was in the Trustees' post-trial brief. And they say, there is simply no competent evidence to support the conclusion that the -- that because some claims were withdrawn, the process or the remaining claims are invalid.

This completely turns the obvious implications of this massive abandonment of so many claims from the loan review process on its head. They also ignored Mr. Grice's chart on the withdrawn loans and the claims and the categories. They also ignore Mr. Grice's testimony on the till claims and how he couldn't discern a difference between the ones that were in and why they were out. They also ignore Mr. Grice's testimony that the Trustees' process was unreliable in the sense that it is consistently changing.

So the basic premise of the Trustees' approach in their brief is they abandoned 40 percent of the claims from the output of their loan review process without any explanation. The plan administrator sought discovery to

understand why the Trustees made that decision. The Trustees blocked that discovery and cloaked their decision in privilege, refusing to provide the real reasons for their decision. The Trustees offered no witness or evidence on this point.

And now, the Trustees placed a burden on the plan administrator to provide a detailed explanation as to why this abandonment does not reflect on the quality of their loan review process.

Your Honor, I guess to you that no one can figure out what was done and why this withdrawal makes any sense, other than it was an unsuccessful attempt to try to clean up the results of a significantly flawed process.

The next problem with the Trustees' expert report was a dual role Mr. Aronoff played. Your Honor, I'm not going to go through all this again here. I'll try to shorten this because I raise significant concerns about this in my opening about Mr. Aronoff's independence, given that he's basically opining on the reliability or process that he designed.

In their opening, Trustees' counsel responded by saying that Mr. Aronoff's dual expert role was typical in these RMBS cases. Your Honor invited the Trustees to share their cases that support their view this is the way it's done in RMBS cases, and here is the colloquy on that point.

We have now reviewed the Trustees' post-trial brief, and maybe we'll hear from them tomorrow on this.

But tellingly, the Trustees provided no explanation or justification in their brief for the dual role played by Mr. Aronoff. In our view, it's a glaring omission.

THE COURT: Well, I think that the point was -- and, again, maybe this is something we'll take up with Mr. Shuster tomorrow. But I think the point that was made by the Trustees was that it's absolutely ordinary, and it would have to be the case that the person who does the review process comes in and testifies as to what they did.

I agree with that entirely, but there's an additional layer here. Because at least where we started, the process itself was being put on trial. So in that sense, Mr. Aronoff, I believe, was testifying that that process, the details of which he was testifying to as a fact witness, that that process he was giving his expert opinion was a good process.

MR. COSENZA: We agree with that, Your Honor.

THE COURT: Right?

MR. COSENZA: Yes.

THE COURT: So that's kind of the two layers.

MR. COSENZA: Correct.

THE COURT: And then you get to Mr. Morrow.

MR. COSENZA: Yes.

THE COURT: Are you going to --

MR. COSENZA: Yes, I do.

THE COURT: -- discuss Mr. Morrow?

MR. COSENZA: Yeah, I'm going to raise Mr. Morrow. But I just want to raise another evidentiary point that came out during trial. You know, the Trustees' counsel said that Aronoff was put in this position, so he could oversee and execute the review before he could testify to it.

And, Your Honor, that explanation does not make sense based on the record. Despite his comment that he was the boss of the protocol process, Mr. Aronoff was not in a position to execute the review because, as he testified, he wasn't part of the Trustees' protocol process for six months while the protocol was ongoing, and here is his testimony on this point.

And I think that's, you know, an interesting, you know, turn that, you know, if he is indeed he's put in this role so he can oversee and manage the process, you know, the protocol was only going on for, you know, an 18-month period, and he was gone for a third of it, roughly a third of it.

THE COURT: Mr. Aronoff also testified at the protocol hearing way back in the day, didn't he?

MR. COSENZA: That's correct, Your Honor.

THE COURT: Wasn't a fan from the very beginning.

MR. COSENZA: He was not a fan, Your Honor. My colleague, Mr. (indiscernible) and him had a pretty vivid back and forth about the propriety of the protocol.

Moreover, Your Honor, in the Trustees' post-trial brief, and I don't want to overplay this, but I think it was like a telling statement in their brief. And it's on -- they talk about, and they almost implicitly acknowledge, Mr. Aronoff's lack of independence and objectivity. Because when they talk about the loan review being done by an independent person, if you look at their brief, they list only Mr. Morrow and not Mr. Aronoff. Which I think proves the point that here, when they had to go to an independent person to look at this, they decided to bring in Mr. Morrow.

THE COURT: Well, I think that they would say -- they would say this is belt and suspenders. That only does Mr. Aronoff confirm that the process was good, that that Mr. Morrow does an independent review. But if I'm remembering correctly -- and you should correct me if I'm not -- Mr. Morrow reviewed a selection of files that he knew --

MR. COSENZA: Yes.

THE COURT: -- contained breaches.

MR. COSENZA: That's correct, Your Honor. And Mr. Morrow's sample was not designed for the purpose of testing this. As an initial matter, it wasn't even designed to test

the process of identifying breach claims. He didn't review the Trustees' process of identifying breach claims. He didn't talk to anyone from Duff & Phelps, any involvement in QC, didn't look to see if the loan review firms did. He didn't do any of that.

So just before I answer your question about what he did, so this is a case about the Trustees' loan review process; that was the framework for this proceeding when we talked about it over the last -- before even started the trial.

This is a case, again, where the Trustees have the burden. The Trustees do not have an independent expert, from our perspective, on the soundness of the protocol process.

Moreover, then we get to the work that Mr. Morrow did, Your Honor. His sample was drawn only from the 76,044 loans submitted as part of Mr. Aronoff's report. There was no non-breaching control group. Mr. Morrow's sample was not double blind; thus, he was fully aware that the samples solely included loans with breach findings.

Still, even with all that backdrop, he knew where he was going. He was told that these were all breach in claims. He still disagreed with Mr. Aronoff around 7 percent of the time, which, you know, was interesting from our perspective.

Beyond all this, there's a fundamental problem with Mr. Aronoff's opinion regarding the Trustees' breach findings in the protocol. And I think, Your Honor, this was one of the most important parts of this cross-examination. He testified that to make the ultimate breach determination, one must look at the totality of the loan files. That's what he said during his examination, and here's his testimony on this and he said this a few times.

However, as Your Honor can see here on this testimony during his cross-examination, he admitted that he did not know if he reviewed any loan file in its entirely in preparation for this case, even though he opined that every single one of the 76,044 loans that were subject to his report had one or more valid breach findings.

So to summarize this, Your Honor, Mr. Aronoff opined that every single one of the 76,044 loans subject of his report had one or more valid breach claims, and then testified to determine that a breach claim is valid, you have to look at the totality of the loan file. But he also testified, he said he did not know if he reviewed one loan file in its entirety in preparation for this case. At a minimum, this significantly undercuts any weight to be given to his opinion.

Your Honor, I'm now going to move on to the Aronoff summaries, which has got a lot of play, particularly

in light of the recent demonstrative exhibit, but I'm going to walk through the history of this for just a few minutes.

Your Honor, it's our view that the Trustees cannot rely on the summaries contained in the exhibits to Mr. Aronoff's report. On Page 13 of the Trustees' pretrial brief, the Trustees said they were going to provide, quote, concrete breach specific proof through documents that have been provided to the plan administrator during the protocol.

This is from their brief. And, Your Honor, the Trustees claimed that this proof would be admissible through Federal Rule of Evidence 1006, relying on the approach taken in the Marm case. This is Judge (indiscernible)'s case that we refer to consistently in these proceedings.

Under Rule 1006, such summaries must be based on evidence in the record and there must be a witness who can testify to a foundation for the summary, and here are excerpts from some of the key cases. And in fact, the National Gypsum case that's listed here, this is one of the cases cited by the Trustees in their post-trial brief.

At opening, just for context here, the Trustees put up flow charts that had never been provided to the plan administrator during the protocol or expert discovery to support their purported damages claims. The Trustees informed the Court that they would prove their claims through these flow charts.

Here are two of the slides, Your Honor, if you recall them. And the Trustees tried to introduce these flow charts through Mr. Esses. But Mr. Esses' testimony showed these flow charts were not generated from the claims tracking spreadsheet provided to the plan administrator. Instead, the Trustees created the charts through a database they called Team Connect.

This database was never produced to the plan administrator. In their pretrial brief and opening, the Trustees made no mention of the database. And, Your Honor, Mr. Esses started to testify about the Team Connect database at trial. I was curiously listening to that, and it took me a minute or two to understand and object to his testimony because the database had never been produced to us.

Once we understood what he was testifying to, again, I objected, and that objection was sustained. Thus, the Trustees could lay no foundation for testimony about the data from the unproduced database. Without that foundation, the Trustees never again discussed the flow charts they used in opening.

The Trustees next sought to rely on a series of summaries of data attached as exhibits to Mr. Aronoff's opening report. At trial, Mr. Aronoff seemed to testify that the source used to create those summaries was the same Team Connect database. Here is Mr. Aronoff's testimony, and

to speed things up, I'm going to focus on the relevant Q&A in the middle here:

Q Mr. Aronoff, in your deposition, didn't you tell me that the data for Exhibit 4 was extracted from a different database?

My understanding is that the data that was the source of data for the claims tracking spreadsheet was the same database that was used to prepare the data points in the exhibit. And then he goes on to say: But since I didn't physically create Exhibit 4, I'm somewhat uncertain as to what the priority of creation of Exhibit 4 was.

In any event, at various times, the Trustees have tried to argue that there really is no difference between the data in the claims tracking spreadsheet that was produced to the plan administrator during the protocol and the Team Connect database.

At trial, the plan administrator demonstrated that the data in Team Connect did not match the claims tracking spreadsheet. Here are just two examples of data found in Mr. Aronoff's Exhibit 5 that was not found in the claims tracking spreadsheet. This is -- here's a slide for loan ending in 4680. This is a misrepresentation of debt claim where the Trustees claim a total undisclosed debt of over $3 million. It's not found anywhere on the claims tracking spreadsheet. Next, loan 6910. Here is another

misrepresentation of debts claim, with total debt of over $500,000 that isn't anywhere on the claims tracking spreadsheet. Also, the side text evidence that the Trustees are citing does not appear anywhere on the claims tracking spreadsheet, but it's in Mr. Aronoff's exhibit.

Apparently, the Team Connect database changed after the claims tracking spreadsheet was provided to the plan administrator, but before the data was extracted from it for Mr. Aronoff's summaries.

I'd like to back up a second, Your Honor, and go back to the case that the Trustees cited in their pretrial brief. This is the case that they relied on, they were going to try to show that these types of summaries are allowed into evidence in RMBS cases under Federal Rule of Evidence 1006. Again, this is the Marm case.

THE COURT: This is in Marm 3?

MR. COSENZA: Yeah, I believe so, Your Honor.

THE COURT: Nope.

MR. COSENZA: It may not be. Marm --

THE COURT: Yeah, it is. It's Marm 3.

MR. COSENZA: Yes, yes, it is. Yes, it is. But let me explain what happened in Marm. In the Marm case, the Court accepted some reason to evidence under Federal Rules of Evidence 1006 only after the Trustee designated a witness who described his method for summarizing the data. That

witness provided a declaration and detailed his work.

And in Marm, even more importantly, the underlying databases were actually received into evidence by the Court and provided to the other party. That party had an opportunity to review, challenge, and confirm the accuracy of the underlying data.

None of that happened here, Your Honor. After years of the protocol, six months of expert discovery, over a dozen expert reports, numerous exchanges of data and materials, and trial, the Trustees failed to lay a foundation for the database that supports their summaries and failed to provide that database to the plan administrator. And as a result, we were not afforded an opportunity to test their database.

Now in their post-trial brief, and this is a very confusing footnote. It's Footnote 20, and it's very long. It takes up a big chunk of the page. There are lots of concessions in here. And it's actually, Your Honor, it took me several times to read this to try --

THE COURT: Footnote 20?

MR. COSENZA: Yeah. I had some difficulty figuring this out, but I'm going to try to work through it as quickly as I can.

It concedes that the information in the Aronoff spreadsheets were, quote, derived from all the loan files

and all the other information exchanged in the protocol, so that's over 20 million pages of loan files, plus everything else.

THE COURT: Right.

MR. COSENZA: Again, it concedes that the database that drew from this enormous of volume of documents and was a direct source for the summaries was never produced to the plan administrator. And, further, it illustrates, if anything, that Mr. Aronoff provided no foundational testimony for how the data went into the Team Connect database; and then from the Team Connect database, somehow into these summaries.

Your Honor, in addition to being inadmissible under Federal Rule of Evidence 1006 --

THE COURT: Well, let's go back to the very beginning because this is difficult.

MR. COSENZA: Yes.

THE COURT: Isn't the Trustees' point -- and, again, Mr. Shuster can address this tomorrow, I'm sure. But kind of the story begins and ends in the first sentence. My impression of the argument that we've had on this point up to this point, was that the exhibits, because the exhibits were derived from the data contained in the materials exchanged during the protocol, all of which are admissible under Exhibit G, that's all that needs to be done to

establish a predicate for the so-called summary.

That's my impression of what the argument is, that over here are 20 million documents, and over here is a summary of them. And no one in their right mind could suggest that someone's going to go through 20 million documents, so here's a summary.

MR. COSENZA: So on that --

THE COURT: I mean, that's kind of --

MR. COSENZA: I agree with you, that is the argument. But I think it misses two foundational principles of Federal Rule of Evidence 1006, which is there is no foundational witness to explain how it went from 20 million pages of stuff into this spreadsheet, which I think is sort of an important point.

And I also just think, you know, beyond -- and I'm going to move to the second point, Your Honor, which I think is also -- second point is also the database was never produce here, so we never had a chance to really test the validity of the database. But I want to move on, because I know we've dealt -- we've had some issues on the 1006, to move on to --

THE COURT: But don't you -- I just -- I'm going to force you to stay on this point for a minute because it's so important. Leading up to today, didn't you -- didn't the plan administrator also make the argument that this is no

ordinary database. I, in the past, have used the example of weather data, which is actual data over time, geographic locations, et cetera, et cetera.

But I thought part of your point was also that there were subjective determinations that went into the very creation of the initial -- the database.

MR. COSENZA: That's absolutely correct, Your Honor.

THE COURT: That's another --

MR. COSENZA: So I want to just -- I'm trying to break this into two things.

THE COURT: Okay.

MR. COSENZA: One is --

THE COURT: I apologize.

MR. COSENZA: No, no. You understand I'm trying to -- maybe I'm not being artful enough. First, I'm trying to explain why under 1006 really these things shouldn't be allowed into evidence. My next prong of my argument will be, even if you were to allow these 1006, sort of the inherent unreliability and the issues associated with using these summaries.

THE COURT: I'm going to try to enforce my own promise to not talk because I need to get you out of here.

MR. COSENZA: No. But Your Honor's question is the right question because it's basically the next graphic

I'm going to go through.

THE COURT: Okay.

MR. COSENZA: Which shows, you know, that here are some of the other fundamental problems that show Mr. Aronoff's summaries are unreliable. He testified that the data in these summaries were entered into Team Connect. And as Your Honor just mentioned, this is an argument we made before, that they're based on subjective judgments of the loan review firms whose job it was was to generate evidence in favor of a breach.

The loan review firms did not list any contradictory evidence in the database. The loan review firms did not even list all the evidence supporting their claim. And the loan review firms manually inputting certain data fields from the loan and claim files into Team Connect, and that resulted in mistakes that we saw at trial. The Trustees provided no evidence that there was a consistent approach or policy from which the data was taken from the loan file and put into Team Connect.

Also, the monthly income numbers in the summaries do not state the actual income of the borrower, and I'm going to explain that. I promised you before, I'm going to explain that to you in a couple of minutes. So there's no way these summaries can be used to prove the magnitude of misstatement of income.

Then, Your Honor, as you showed at trial -- I'm going to go through these very quickly. They're just the basic errors in the database that we went through Mr. Aronoff to show that there were mistakes. There was loan file ending in 2262 that had a series of entry mistakes and aggregation of number mistakes. And also, loan file 3557, there's another misrepresentation of income claim where a zero was dropped and the numbers were off.

So, Your Honor, the Aronoff summaries are not admissible in our view under 1006. And even if the Court were to admit them in a bench trial and, you know, we understand, in our view, they should not be given any weight given the number of material issues undermine their reliability.

So, Your Honor, I'm now going to move on from these Aronoff exhibits to the newly introduced demonstrative. And it's our view that the Trustees should not be allowed to introduce into evidence a previously undisclosed demonstrative that they intend, we understand, to use at closing.

The Trustees now try to combine the information and the unreliable Aronoff summaries with the purchase price put together by Dr. Snow, which, in turn, relies on data from Dr. Elson, and a new model that they've indicated they will offer for the first time in closing.

Like the Aronoff summaries, the Trustees never offered any witness to provide a foundation for this model, and only disclosed that they would be using something like this after the last live witness testified.

And, Your Honor, I struggled to try to simplify this because it's hard to do with what they're trying to do. But just to put context for this model, I'm just going to make sure I have this right. The model purports to summarize the data in the Aronoff summaries, which are themselves a summary of Team Connect, which is just a compilation of subjective judgments from 20 million pages of loan files. And not only that, for the first time, it then graphs on to the Aronoff exhibits the Snow purchase price calculations and then the underlying data from Dr. Elson.

So we had no opportunity during discovery or trial to test this model or to examine the people who created it. There's no evidentiary support for any of the particular purchase price scenarios that the Trustees are planning to present. And the Trustees want the Court, as I showed you earlier, to now use this model to apply various discounts.

In any event, there are a number of additional problems with this demonstrative. First, and I said a few times I'm going to go through this in detail, but it relies on the magnitude of breach data based on the difference between actual income and the income listed on the mortgage

application.

And, Your Honor, you touched on this with Mr. Rollin. Mr. Aronoff made very clear, however, that the loan review firms were not tasked with verifying borrowers' actual incomes. Here is his testimony.

THE COURT: Mr. Cosenza, hold on one second.

MR. COSENZA: Yes.

THE COURT: So it's been longer than two hours. I sense that you're talking faster because you're aware of that.

MR. COSENZA: Yes, yes.

THE COURT: So just slow down.

MR. COSENZA: Sure.

THE COURT: Finish what you have.

MR. COSENZA: Okay.

THE COURT: And we'll make sure that, to the extent that Mr. Shuster would like a longer time period, it will be fair and equal. Okay?

MR. COSENZA: I appreciate that Your Honor. I'll slow down a little.

THE COURT: So just slow down.

MR. COSENZA: Sure. So, Your Honor, to go through what Mr. Aronoff had made clear that the loan reviewers were not tasked with verifying borrowers' actual incomes. Here is his testimony. Because, again, as Mr. Rollin said some

confusion about this, about his charts, what were listed on his column from his reports what Mr. Esses had testified to and what was said in opening.

And he said, let me be clear about answering this. As I discussed yesterday, the purpose of the investigation of the forensic loan review with respect to income was not to verify the actual income of the borrower, but it was to make a determination whether it was more likely than not that the stated income was misrepresented.

It is important to note that the predicate for the Trustees' 32,213 misrepresentation of income claims and for the 10,859 DTI claims is the determination of actual borrower income as compared to the income the borrower stated on his or her loan application.

Without an actual income number, the Trustees have no evidentiary basis for presenting any alleged magnitude of misstatement or income or any categories in this demonstrative reflecting the number of income breaches over a certain magnitude. That is critical because their model -- and, again, we'll see how they use it tomorrow, but this is how we understand it -- is predicated on assertions that the borrower breaches exceeded certain percent thresholds.

Based on the Trustees own admissions, there is no evidentiary foundation for those calculations and they should be disregarded.

Another major problem with this model is that it's approach of grouping claims and evidence types together was repeatedly contradicted by their primary witness. And, Your Honor, taking a step back, they're basically saying you can take a certain piece of evidence and a certain breach type, check two boxes, and get to a number. That's what this model does.

But Mr. Aronoff said that the purpose of his summaries is not to group claims together and say that if the Trustees win on one claim, they win on all claims in a particular breach category. Here's what Mr. Aronoff said when he was cross examined:

So to be clear, by highlighting these accepted loans, you're not saying that just because the plan administrator accepts one misrepresentation of the income claim, it should accept them all, right? I don't think I came close to saying that. And you're not saying because the Trustees base one misrepresentation of income claim that was accepted on a particular kind of evidence, like a bankruptcy filing, for example, the plan administrator therefore should accept all misrepresentation claims based on a bankruptcy filing, right? I stand by the language in my report, and that's not -- I didn't say what you just said, no.

THE COURT: I don't think I'm following you on

this point.

MR. COSENZA: Sure.

THE COURT: Isn't it we have the flip. I mean, here, he's testifying about the plan administrator, but aren't these summaries the calculator that I think I'm going to see tomorrow, doesn't it do the opposite; doesn't it say that --

MR. COSENZA: But I think, so --

THE COURT: That I should accept the Trustees' proof on a category by category?

MR. COSENZA: What I think this -- this is in context of looking at the plan administrator accepting one claim.

THE COURT: Right.

MR. COSENZA: And he says based on one breach type using one form of evidence. And we then asked him, are you saying that if we accept a loan that has a certain breach with certain evidence, we should accept them all? And he says, no, you can't do it that way. That's what he is saying in his testimony.

THE COURT: Okay. So you're saying that this testimony undermines the calculator approach --

MR. COSENZA: Correct.

THE COURT: -- that's now going to be presented to me because it does that very thing. It says buckets by

breach type and says here's one, they're all the same.

MR. COSENZA: Correct.

THE COURT: Apply that sorting and get to a number on that particular breach type.

MR. COSENZA: That's correct, Your Honor. And I'm going to explain why, you know, why what Mr. Aronoff said makes total sense in the context of what we've heard this entire proceeding.

Although the Trustees seem to dispute this in their post-trial brief, the evidence in the record demonstrated that every loan file is unique and breaches in AMA must be reviewed within the context of the whole loan file. As Mr. Rollin described earlier, whether a particular piece of evidence is reliable and sufficient to prove a breach depends on all the other information in the file.

We talked about the demonstrative we had at opening to snowflakes. Even Mr. Aronoff always comes back to this, as we mentioned earlier in our presentation. Here is his testimony when he was cross examined about understanding whether a claim was correct. He goes back to, upon questions from Your Honor, I'll have to look at the whole loan file.

Yet, the Trustees seek to use the scenarios generated by the model to do precisely what their primary expert on liability says cannot be done: prove breach claims

based on summaries that isolate one or a few pieces of evidence divorced from the file as conclusive proof of their entitlement to billions of dollars in damages.

In conclusion, the demonstrative the Trustees are offering is not even evidence. And even if admissible, it should be given no weight.

Your Honor, I'm going to, in light of your comments, I'm going to move very quickly through. I had a section on damages, but I think our briefs do cover that in sufficient detail. But I do want to note that the Trustees offered no loan-by-loan measure of damages, other than the full purchase price. And that the full purchase price, in fact, cannot be the proper measure of damages here, at least in part because it includes interest that's not recoverable under 502(b)(2) of the Bankruptcy Code, and we cover that at length in our brief. And I think the Trustees' arguments and response are sufficiently dealt with in our brief.

And then moving on to the Trustees' damages calculation for active loans and how they were unreliable and overstated. Again, this is detailed in our briefs, but I want to give --

THE COURT: I mean, I don't want to delay our being done here today.

MR. COSENZA: Sure.

THE COURT: But, you know, 502(b)(2), we're not

talking about debt of the debtor here. These are -- this is underlying debt in these mortgage pools, so I don't think we have to spend a lot of time on this point; that I just wanted to not let it fly by without making that comment.

MR. COSENZA: But I just -- my only response to that, Your Honor, would be that we are still being held accountable for the interest that is accruing on these loans for years, and the interest is being charged through to the plan administrator.

Next, I want to touch on the Trustees' damages calculations for active loans and how they are unreliable and overstated. Again, as in our brief, for the non-liquidated loans, the parties agree that the purchase price formula is not alone sufficient because it fails to take into consideration the fact that the Trustees are not putting back the loans, nor have they liquidated. Thus, the trust will recede any future cash flows and liquidation proceeds on these loans, in addition to any recovery in this action.

At trial and our post-trial brief, the plan administrator presented evidence that the Trustees never tested the accuracy of their damages methodology, by comparing the predictions of losses on active loans to the realized losses that were actually reported on those loans after liquidation. In fact, if we look at loans that Dr.

Elson values that have liquidated since his opening report, the Trustees' damages methodology predicted damages on those loans that exceeded the actual losses by approximately 70 percent.

In our view, the Trustees have failed that they've offered the Court a reliable measure of damages on the population of non-liquidated loans.

Your Honor, as I mentioned in my opening, Lehman does not exist anymore. We're the plan administrator trying to put a fair number on the Trustees' claims. As we outlined above, there were a number of fundamental disagreements that the plan administrator has about how the Trustees designed their loan review process and how they generated claims.

The plan administrator does understand that, as advocated for the trust at issue, the Trustees took a zealous approach to asserting claims.

For all the reasons outlined above, the Trustees' approach simply did not work, and they did not meet their burden of proof for anything in excess, in our view, of the compensable claims approved by the plan administrator in the protocol, which is between $278.1 and $301.8 million. This range was based on the claims approved by the plan administrator during the protocol. And Dr. Cornell testified to this chart identifying the mortgage loans with

compensable claims.

However, Your Honor, as we previewed earlier, the value -- this is the value that was associated with the preliminary results of steps one, two, and the very beginning of step three of the protocol.

Since the purpose of this proceeding is to estimate what the protocol would have yielded had steps three to five been completed, which would have presumably involved compromise of a significant number of the disputed claims and judicial resolution of unresolved claims, the plan administrator believes the claim value -- sorry.

The plan administrator believes that the claim value ultimately would have been higher than the $278.1 to $301.8 million range reflected on this chart, so the plan administrator is not seeking to estimate the claim in that range. We are trying to be fair.

So the preliminary results of the protocol at the point the protocol was suspended provide only extreme bookends of value. As I described in my opening, the plan administrator believes there are other benchmarks of value that are reliable and fair metrics for estimating this claim. As described in my opening, the plan administrator has now provided record evidence of those guideposts, and here they are again. This is the slide I used in my opening, Your Honor.

There is a critical factor in the plan administrator's decision to enter into the settlement that all parties agreed that the plan administrator be permitted to introduce into evidence several metrics to demonstrate why the $2.38 billion-dollar number was a reasonable level at which to resolve the Trustees' claims. Because the plan administrator believes those are the most reliable and appropriate bases to estimate this claim in light of all the issues I described about the Trustees' process and results.

This is why, as I mentioned at the beginning of my closing, Your Honor, it was an unusual move, but we negotiated for the entry into evidence of certain data points that typically courts are not allowed to use in adjudicating claims. So by the parties agreement, Exhibit G, allowed both parties to introduce comparable global RMBS settlements, and the plan administrator's settlement with the institutional investors from October 2015 into evidence.

As we have said throughout these proceedings, the plan administrator's estimate of $2.38 billion is supported by the four guideposts. Again, the first guidepost is the -- this is the amount equivalent to the settlement negotiated in October of 2015 for $2.4 billion with the institutional investors for covered and transferred loan claims, as Professor Fischel testified.

Again, as I previewed in my opening, Professor

Fischel gave highly credible testimony supporting the reasonableness of settlement at $2.38 billion dollars. He testified that the institutional investors have a strong incentive to advocate for the best possible result for the trust because they have the largest economic stake in the proposed claim.

This demonstrative shows that the institutional investors own 23.97 percent of these certificates issued by the trust. And Professor Fischel also explained that the institutional investors are some of the most sophisticated and experienced investors in RMBS.

The plan administrator maintains that this settlement with the institutional investors is a sound basis for the Court to use to estimate these claims. This guidepost provides a real-world proxy for how sophisticated parties with a financial interest in this litigation value the claims here. The plan administrator maintains that this is very similar to the purpose of this estimation proceeding. All of these reasons, as Professor Fischel opined --

THE COURT: What about the argument that this really shouldn't count very much because those -- the institutional investors in this settlement didn't have the benefit of all the data, the loan review process that's occurred here; and had they only done that, they presumably

wouldn't have settled at that level.

MR. COSENZA: Yeah. So, Your Honor, on that point, I think Professor Fischel, who acted as the expert for the Trustees in those cases, he testified that -- this is in the comparable cases, he said that some of those cases did have loan level review. And he said, even in those cases that did have some level of loan level review, it wasn't clear whether review really contribute one way or another to making a settlement lower or higher; specifically, where there's such a disparate opinion about the results of loan file reviews because so much subjective judgment is required.

So, Your Honor, moving on to the second guidepost is Professor Fishel's comparison of the plan administrator's proposed settlement amount to other comparable global RMBS settlements. Professor Fishel is uniquely qualified to opine on the reasonableness of settlements in this context. He has served as an expert witness in numerous other significant RMBS cases. He testified that he served as an expert for many of the same Trustees here, and the Bank of America, WAMU, and J.P. Morgan global RMBS settlements.

Professor Fishel performed his analysis here by comparing recovery ratios, a calculation of the settlement amount, divided by the expected lifetime losses for the trust at issue. Professor Fishel concluded that the

recovery ratios for the recent comparable settlements are consistent with LBHI's proposed allowed claim, while the Trustees' proposed allowed claim was a complete outlier.

As Your Honor can see from this chart, LBHI's proposed allowed claim is approximately 11.2 percent of expected lifetime losses on the covered loans, which is substantially above the recovery ratios for J.P. Morgan, Citigroup, and Res Cap, and within the range of Countrywide's settlement and two percentage points below the Washington Mutual settlement.

The Trustees' proposed allowed claim, which they sought here at 11.4 billion is three times as high as the largest recovery ratio -- 55 percent. Professor Fishel concluded that Lehman's proposed allowed claim is well within the range of all the other comparable settlements, and if anything, toward the high end of the range, and that Trustees' proposed allowed claims is many multiples greater than any of the other comparable settlements.

In their opening statement and brief, the Trustees argued that these settlements were not comparable because of the effort Your Honor just talked about, they were made to look at loan files. As Professor Fishel testified, the loan file review, we don't think, makes much of a difference, especially given the fundamental disagreements here and what claims should have been put through the protocol.

In response to Professor Fishel's analysis, the Trustees also put forward an expert, Mr. Finkel, to show that the recovery ratio of 11.2 percent was too low. The proffered settlements put forward by the Trustees' expert, Mr. Finkel, are not comparable.

First of all, the six settlements put forward were residential mortgage putback cases involving individual trusts, not global RMBS settlements. Second, they all covered only one group of loans in each of those trusts, all of which were securitized in 2007. Third, they allowed different types of collateral, home equity lines of credit. And lastly, the trustee for five of those six trusts was Deutsche Bank, which as Mr. Finkel admitted, was subject to a DOJ consent decree for its conduct as a sponsor of RMBS.

Further, and I think this was, you know, one of the more important moments of Mr. Finkel's examination. He ignored other settlements obtained by the Trustees' counsel and other RMBS cases that he was told not to analyze where the plaintiffs allege that they had conducted loan reviews with high rates for breaches and which had recovery ratios in line with Lehman's proposed amount, even under the most favorable assumptions. And, Your Honor, that's the Debolt 2007-083 trust and the Debolt 2007-084 trust. And you can see the recovery ratios on this chart.

Finally, the Trustees make a few new arguments in

their post-trial brief as to why Professor Fishel's methodology was flawed. None of those are persuasive attacks on Professor Fishel's methodology or conclusions.

The Trustees argue that the claims underlying the settlements that Professor Fishel used as comparable were, quote, generally time barred. This is highly misleading, Your Honor. The settlements considered by Professor Fishel did contain some trusts for which a statute of limitations defense was asserted at the time of the settlements.

THE COURT: Yeah, so I was -- I noticed that in the briefs, is there any testimony on those -- on the point of the percentages of claims that were time barred in the comparable settlements? Or maybe I'll ask Mr. Shuster about that tomorrow.

MR. COSENZA: Yeah, I do believe, at least at the time of the expert reports, the statute of limitations issue had not been adjudicated, and we can ask Mr. Shuster about that tomorrow.

THE COURT: Okay.

MR. COSENZA: And the settlements contained many other -- and, Your Honor, the other point is, the settlements contained many other trusts that did not have claims subject to the statute of limitations defense. And the same Trustees here still recommended acceptance of the settlements for the accepting trust in those cases,

including those with no statute of limitation defense, weighing all of the applicable defenses.

At trial, Professor Fishel acknowledged the statute of limitations defense applicable in those other cases, so this is not like a new groundbreaking thing in their brief. But he also noted in this case that the Trustees are not entitled to prejudgment interest, which the Trustees ignored in their breach and which constituted very substantial exposure for the non-debtor defendants in those comparable cases.

Your Honor, I think you touched this. But the Trustees also claim that Professor Fishel's methodology is flawed because he did not make an upward adjustment for the fact that the Trustees will not receive the full cash value of their claim, but will instead receive a claim in bankruptcy dollars.

Your Honor, I think that should just be rejected. The Trustees represented to the Court they would not seek to be placed in a better position than other creditors and there's no case law supporting that.

I'll move on to the third guidepost. It's that the Trustees accepted equivalent valuations for identical RMBS claims in connection with the sale of RMBS claims owned by terminated trusts. We discussed this in my opening in detail. I went through this very long chart.

There was testimony from both Mr. Trumpp and Professor Fishel that six trusts had terminated as of the start of this proceeding. And Dr. Fishel -- Professor Fishel testified that he was aware of this, and that claims by outside appraiser were valued by five of the six trusts at the level of Lehman's proposed claim, and one of the six were valued at a much lower value.

Dr. Fisher -- Professor Fishel testified that, again, this is just consistent with the other evidence I reviewed of the different pieces of data, also for Lehman's proposed allowed claim.

As I explained in my opening, for these collapsed trusts, the master servicer exercises its cleanup call option. A part of this process involves the hiring of an appraiser to value the property of the trust, which includes the trust's RMBS claims at issue here. The master servicer identifies an appraiser to identify the trusts' damages claims.

Despite the Trustees' complaints here and in their post-trial brief, the Trustees have the right and obligation to accept or reject the appraiser. And Your Honor can see this from the trust agreement for the Sorem 2004-05 trust, one of the trusts that collapsed, in Section 7.1(b) whether Trustees have a consent right over the appraiser. Thereafter, the appraiser is directed to come up with a fair

price or value for the sale of the claim by the trustee to the servicer.

Five times -- and this is a chart I showed in opening -- the Trustees authorized the assessment of the trusts claims value at precisely the level the plan administrator seeks; and in one instance, at a significantly lower level. And Professor Fishel said that this indicates to him that the $2.3 billion that Lehman seeks to estimate the Trustees' claim indicates to him that it's fair and reasonable.

At trial, the Trustees' counsel claimed, quote, they don't agree with that appraisal. The Trustees also stated in their post-trial brief that Lehman's evidence regarding the collapsed trust was completely undermined at trial. And that's from Page 50 of their brief.

Your Honor, that statement is baffling. Despite having the opportunity at trial, the Trustees have offered not witness to testify that the Trustees disagreed with any of the appraisals or that they ever raised an objection with the choice of the appraiser, which the Trustees had the right to do after they received the first appraisal, but they never did.

In fact, if the Trustees thought that the $11.4 billion that they were seeking here was a fair proxy of value, how could they allow the claims to be sold at a level

proportionate to the $2.38 billion or lower for these six terminated trusts? As fiduciaries, the Trustees could not.

The Trustees sold the trust assets to a willing buyer for each of these six trusts based on the appraisal. If the transaction between the Trustees and a willing buyer that serves as a guidepost for the court to use in this estimation proceeding.

Next, the Trustees argue in their brief that the appraisals used for these transactions should be given no weight because there's no evidence that the non-public loan level protocol results were available to the appraiser. This argument confuses the issue. The point here is that the Trustees are on one side of the transaction did have the results of the loan level protocol review, did not challenge the appraisal, the use of this same appraiser, or that appraiser's methods.

THE COURT: Did the Trustees have the right to object to the appraisal?

MR. COSENZA: They had the right, Your Honor, after the appraiser came back with the first appraisal; for subsequent appraisals, they had the right to object to that appraiser or tell the appraisers that the methods he's using are inappropriate. And I would also suggest, Your Honor, that the first appraisal came well below the value. As fiduciaries, they could not have sold those assets at such a

significant discount. They would have had to have raised an issue.

Again, Your Honor, there's the critical point here. There are no witnesses offered by the Trustees to indicate that the Trustees, consistent with their fiduciary duties, did anything beyond selling the trust assets to a willing buyer at a price set by an independent appraiser, who they could have removed after receiving the first assessment and before he generated subsequent appraisals for subsequent deals.

So, Your Honor, as I mentioned in my opening, this column, Column 2 to this chart, this is what we think is an indication of what a willing buyer paid for these assets from a willing seller based on the appraisal. And if this was not the appropriate value, the Trustees were obligated to either object to the selection of the appraisal, raise issues with the appraiser's methodology, or do something except sell these claims at this value.

The last guidepost, Your Honor, is Dr. Cornell's estimation scenarios. After applying very generous success assumptions provided by the plan administrator designed to illustrate the success rates necessary to achieve a result in line with the plan administrator's proposed claim, Dr. Cornell opined that the Trustees' recovery in the four scenarios ranged from $1.6 billion to $2.5 billion.

And, Your Honor, as Dr. Cornell used in his demonstrative, he had four scenarios: one was for all loans in the loan population at issue; two was for excluding the on-hold loans, but included the non-liquidated loans; the third scenario was excluding the non-liquidated loans, but included the on-hold loans; and fourth was excluding both the on-hold loans and non-liquidated loans from the population.

For his first estimation scenario, which included all of the loans at issue and using the generous assumptions provided by the plan administrator, Dr. Cornell's calculation came to $2.49 billion. Next, this is reflected in this chart, testified that using the same assumptions, but including the on-hold loans and not the active loans, his calculation came to $2.11 billion.

In the third scenario, Dr. Cornell included active loans, but not the on-hold loan population; that calculation came to $1.92 billion. In the fourth scenario, Dr. Cornell testified that he calculated a claim value and excluded both the on-hold loans and the active loan population, and that resulted in a recovery for the Trustees of $1.63 billion.

As Dr. Cornell testified, his analysis assumed that the claims were uncorrelated, despite the fact that Dr. Cornell actually believed many of the claims likely did have a positive correlation. As a result, Dr. Cornell adopted

the generous assumptions stated concluded that the Trustees were given multiple opportunities to prove their claims on loans with multiple breach assertions.

In addition, as I discussed briefly earlier, Your Honor, Dr. Cornell's calculations here do not account for the fact that we believe that Section 502(b)(2) prohibits awarding interest here, which all the scenarios include.

And it would be our view and based on Dr. Cornell's testimony and just looking at Dr. Snow's calculations, that if you were to agree with us on the 502(b)(2) issue, all of these numbers would have to be reduced by 20 percent.

Your Honor, we submit that these scenarios demonstrate, again, that the plan administrator's request to estimate the claim at $2.38 billion or less is fair and reasonable.

In conclusion, Your Honor, for all the reasons I've outlined above, the Trustees have not met their burden to estimate their claims at more than $2.38 billion. The plan administrator respectfully requests that the Court, based on the evidence Your Honor heard at trial and after considering the equities of this case, estimate and allow the Trustees' claim at $2.38 billion.

THE COURT: All right.

MR. COSENZA: Thank you, Your Honor.

THE COURT: Thank you very much, Mr. Cosenza and Mr. Rollin. So, it is 3:15, not -- well, off the mark, but by an understandable amount. But for the purposes of planning tomorrow, Mr. Goldberg and to let Mr. Shuster know, we are going to start at 9:00. Right? I do have a conference call that I have to take at noon. So depending upon how -- he doesn't necessarily have to use equal time that Mr. Cosenza did, but he'll be afforded that. I'm going to have to take a break at noon for, I would say, 15 minutes to do this conference call. And then we could resume and, hopefully, rebuttal and so rebuttal can be kept to an absolute minimum.

MR. COSENZA: Sure, understood, Your Honor.

THE COURT: All right?

MR. COSENZA: Thank you, Your Honor.

THE COURT: Thank you.

MR. COSENZA: Sorry for speaking so quickly, but I wanted to get it down.

THE COURT: No, that's fine.

MR. COSENZA: I apologize to you.

THE COURT: That's fine. Okay, so we'll see you tomorrow morning at 9:00. Okay, very good. Thank you.

(Whereupon these proceedings were concluded at 3:17 PM)

C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing transcript is a true and accurate record of the proceedings.

Sonya Ledanski Hyde

Digitally signed by Sonya Ledanski Hyde
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Date: February 14, 2018